TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

No. 225.

GEORGE C. HAZELTON, APPELLANT,

vs.

FRANCIS MILLER.

APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

FILED APRIL 12, 1905.

(19,707.)

(19,707.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

No. 225.

GEORGE C. HAZELTON, APPELLANT,

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FRANCIS MILLER.

APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., DECEMBER 8 1905.

1 In the Court of Appeals of the District of Columbia.

GEORGE C. HAZELTON, Appellant, vs. FRANCIS MILLER. } No. 1492.

Supreme Court of the District of Columbia.

GEORGE C. HAZELTON, Complainant, vs. FRANCIS MILLER, Defendant. } No. 24238. In Equity.

UNITED STATES OF AMERICA, *District of Columbia, ss:*

Be it remembered, that in the supreme court of the District of Columbia, at the city of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had, in the above-entitled cause, to wit:—

Bill for Specific Execution, etc.

Filed Oct. 16, 1903.

In the Supreme Court of the District of Columbia.

GEORGE C. HAZELTON, Plaintiff, vs. FRANCIS MILLER, Defendant. } Equity. No. 24238.

To the honorable the justice of said court holding the equity court:

The plaintiff, George C. Hazelton is an attorney at law, and brings his bill in equity against Francis Miller, and thereupon shows as follows:

1. That both he and the said defendant are citizens of the United States and reside in the District of Columbia.

2. That this suit is brought by the plaintiff in his own right against the defendant in his own right for the purpose of securing the specific execution of a contract for the conveyance of real estate situated in the District of Columbia entered into between them and hereinafter more fully set forth.

2 3. That on the 11th day of December, A. D., 1902, the defendant, Francis Miller, executed and delivered to the plaintiff his certain contract in writing whereby, for the sum of one dollar and other valuable consideration the said Francis Miller thereby agreed and bound himself and his heirs to sell to George C. Hazleton, who is the same person who is plaintiff in this case, and

to deliver by good and sufficient deed, at any time during the then present session of Congress and such additional time as might be necessary for settlement under appropriation by that Congress, part of lot numbered two (2) in square one hundred and forty-three (143) being six thousand seven hundred and twenty (6720) feet, more or less, and all the ground owned by the said Francis Miller in said square with the improvements thereon for the sum of nine thousand dollars ($9,000.00). It was also provided in said contract that should the said plaintiff fail to take advantage of, and accept said offer as above, within the time mentioned, then that said agreement should be null and void. The said agreement is hereby referred to and made part of this bill and a copy thereof is filed herewith as an exhibit marked "A," and the original will be produced at any time when required by the court or the said defendant.

4. A part of the consideration mentioned in said contract moving to the plaintiff from the defendant was services rendered both before and after the making of said contract, by the plaintiff in bringing the said property to the attention of the committees of Congress as a suitable and appropriate site for a hall of records. Plaintiff, at the instance of the said defendant, who desired to sell said property at a reasonable price, had expended much time and labor and expended considerable money, prior to the making of that contract and has also subsequent thereto, in calling the attention of the committees of Congress to the eligibility and desirability of the land in said square for the purpose aforesaid, and during the two last sessions of Congress plaintiff devoted a great deal of his time to the ascertainment of the condition of the title, the condition of the land as affording a good foundation, the condition, size and durability of the sewers in the streets surrounding said square, the kind, character and condition of the buildings thereon, and other facts tending to show that the said square was a desirable location for said building, and furnishing them to and laying them before the said committees of Congress in order to enable them to act intelligently upon the matter. At the first session of the 57th Congress plaintiff called the attention of the committees of Congress to said location and at the request of the members of said committees, he ascertained and collated various facts in relation thereto, and subsequently during said session at the like request of said committees, prepared a bill to be introduced in Congress authorizing the purchase of said square for said purpose, but the bill did not pass at that session. Subsequently at the second session of said Congress he again called the attention of the committees to the said real estate and at their like request collected and furnished them other important information in relation to it, and employed others to aid and assist him in securing such information to demonstrate to said committees the propriety of said purchase. He also, at his own expense, caused many of said facts to be put in print and furnished them to the members of said committees for their information and for the use of other members of Congress when said bill should come up for debate.

3

At several sessions of Congress he appeared before said committees and filed briefs and made arguments, the object and tendency of which were to show that upon all of the facts presented in relation to this and other sites mentioned and discussed, the square above mentioned was better adapted to the purpose of a hall of records than any other in the city. Said committees all the time understood that he was the owner of some of said property and was acting as attorney for other owners of the said real estate. At the second session of said Congress said bill was passed authorizing the purchase or condemnation of said square for the purpose aforesaid and appropriating the sum of four hundred thousand dollars ($400,000.00), or so much thereof as might be necessary to pay for the same. Said act provided that if the Secretary of the Treasury could by negotiation acquire said square or any part thereof at such figures as might be deemed reasonable, that he might purchase instead of condemning. After the passage of said bill, with the knowledge and acquies-ence of the said Miller, the plaintiff commenced negotiations with the proper officers of the Treasury Department to make a sale of said property to the United States and on the — day of Aug. 1903, agreed with said officers upon a price which they were willing to pay for said property rather than to condemn it, which aggregated about fourteen thousand three hundred and ninety-five dollars and fifty cents ($14,395.50), and informed the defendant that such contract had been consummated, but that it would take some time for the Treasury Department to investigate the title and make arrangements for the payment of the money, and the proper Treasury officers are now engaged in such work and the time has not yet arrived when they can properly, under said act of Congress, pay out the money for the real estate hereinbefore mentioned, and the necessary time for settlemnt under said appropriation has not yet expired.

5. The plaintiff further shows that after he had informed the defendant had knowledge of the sale which he had made to the United States of said property, the defendant intimated to the plaintiff that he did not intend to keep his contract with him, but to convey the property direct to the United States and demand the right to receive from the United States the full sum of money which the Government has agreed to pay for said lot of land, and denies the right of the plaintiff to the purchase money for which said property has sold in excess of nine thousand dollars ($9,000.00). And he is informed and believes that the defendant has made and tendered a deed for said property to the United States, but that the latter
4 has not accepted the same or paid any purchase money on account thereof.

6. The plaintiff further shows that on the 5th day of October, 1903, he caused a deed in proper form from defendant and wife to this plaintiff to be prepared and took it to defendant, and thereupon tendered to him the sum of nine thousand dollars ($9,000.00) in United States legal tender money and demanded of him that he execute and deliver said deed to plaintiff, but the defendant refused to

execute the same. Said deed as prepared and presented to the defendant is filed herewith and marked Exhibit "B," and prayed to be read as part of this bill. And the plaintiff hereby tenders himself ready and willing at any time to pay to the said defendant or into the registry of the court the said sum of nine thousand dollars ($9,000.00) whenever the defendant shall execute and deliver to him or deposit in the registry of the court a deed in proper form conveying complete record title to the plaintiff for said land.

The plaintiff therefore prays as follows:

1st. That the said Francis Miller may be made defendant hereto and that the process of subpœna may issue against him requiring him to answer this bill under oath.

2nd. That the court will by its proper decree to be passed herein, require the said defendant to convey to the plaintiff a good record fee simple title to the said property which is vested in the said defendant.

3rd. That the defendant may be temporarily enjoined during the pendency of this suit from conveying said real estate to the United States or any one else and from receiving from the United States any money or any draft or warrant which may be issued by the Treasury Department in payment for said land and that at the final hearing said injunction may be made perpetual.

4th. The plaintiff prays for such other and general relief in the premises as he may be entitled to.

C. C. COLE,
Attorney for Plaintiff.

The defendant to this bill is Francis Miller.

DISTRICT OF COLUMBIA, *To wit:*

George C. Hazleton being duly sworn says upon oath that he is the plaintiff mentioned in the foregoing bill; that he has read the same and knows its contents and that the matters therein stated upon his knowledge are true, and those stated upon information and belief, he believes to be true.

GEO. C. HAZELTON.

Subscribed and sworn to before me this 16th day of October, A. D. 1903.

WALTER F. DONALDSON,
[NOTARIAL SEAL.] *Notary Public, D. C.*

5 EXHIBIT A.

Agreement to Sell.

For the sum of one dollar and other valuable considerations, I hereby agree and bind myself and my heirs to sell to George C. Hazelton, and to deliver by good and sufficient deed at any time

during the present session of Congress, and such additional time as may be necessary for settlement under appropriation by that Congress, part of lot numbered two (2), in square numbered one hundred and forty-three (143) being six thousand, seven hundred and twenty (6,720) feet more or less, and all the ground owned by me in said square with the improvements thereon, for the sum of nine thousand dollars ($9,000).

Should the said George C. Hazelton fail to take advantage of and accept this offer as above within the time mentioned, then this agreement shall be null and void.

Witness my hand this 11th day of December, A. D. 1902.

(Signed) FRANCIS MILLER.

Witness:
WILL H. ALBURGER.

EXHIBIT B.

This deed, made this 5th day of October in the year one thousand nine hundred and three by and between Francis Miller and ——— Miller, his wife, both of Washington, District of Columbia parties of of the first part, and George C. Hazelton of Washington, District of Columbia, party of the second part:

Witnesseth, that in consideration of nine thousand dollars the parties of the first part do grant unto the party of the second part, in fee simple, all that piece or parcel of land in the city of Washington, District of Columbia, described as follows, to wit; the west part of original lot numbered two (2) in square numbered one hundred and forty-three (143), contained within the following metes and bounds, viz:—Beginning for the same eighty-nine (89) feet, one (1) inch west of the southeast corner of said square, and running thence west on E street, fifty-one (51) feet, to the southwest corner of said lot two (2); thence north one hundred and sixty-eight (168) feet to the north line of said lot; thence east thirty-one (31) feet; thence south ninety-two (92) feet; thence east twenty (20) feet; and thence south seventy-six (76) feet, to the place of beginning, containing 6728 feet more or less together with the improvements, rights, privileges and appurtenances to the same belonging.

And the said parties of the first part covenant that they will warrant the title to the property hereby conveyed; and that they
6 will execute such further assurances of said land as may be requisite.

Witness our hands and seals the day and year hereinbefore written.

In presence of—

——— ———. ——— ———. [SEAL.]

——— ———. ——— ———. [SEAL.]

DISTRICT OF COLUMBIA, *To wit:*

I, —— ——, a notary public in and for the District of Columbia, do hereby certify that Francis Miller and —— Miller his wife parties to a certain deed bearing date on the — day of October 1903, and hereto annexed, personally appear before me in said District, the said Francis Miller and —— Miller, his wife being personally well known to me as the persons who executed the said deed, and acknowledged the same to be their act and deed.

Given under my hand and seal this — day of October, 1903.

—— ——. [SEAL.]

Demurrer.

Filed Dec. 1, 1903.

In the Supreme Court of the District of Columbia.

GEORGE C. HAZELTON
vs.
FRANCIS MILLER. } No. 24238. Equity.

The defendant demurs to the complainant's bill, and, for cause of demurrer, shows that the complainant has not, in and by his said bill, stated such a case as entitles him to any relief in equity against this defendant.

J. J. DARLINGTON,
Sol. for Defendant.

I certify that, in my opinion, the foregoing demurrer is well founded in point of law.

J. J. DARLINGTON,
Sol. for Defendant.

DISTRICT OF COLUMBIA, *ss:*

I, Francis Miller, defendant in the above entitled cause, on oath say that the foregoing demurrer is not interposed for purposes of delay.

FRANCIS MILLER.

7 Subscribed and sworn to before me this first day of December, A. D. 1903.

LAURA A. SHUGRUE,
[NOTARIAL SEAL.] *Notary Public, Dist. of Col.*

Service accepted this first day of December, A. D. 1903.

C. C. COLE,
Sol. for Comp't.

Decree Sustaining Demurrer and Dismissing Bill.

Filed Sep. 16, 1904.

In the Supreme Court of the District of Columbia.

GEORGE C. HAZELTON
vs.
FRANCIS MILLER. } No. 24238. Equity.

This cause coming on to be heard upon the defendant's demurrer to the complainant's bill, and having been argued by the solicitors for the parties respectively, and duly considered, it is thereupon by the court, this 16th day of September, A. D. 1904, adjudged, ordered and decreed that the said demurrer be, and the same hereby is, sustained, and that the complainant's bill be, and the same hereby is, dismissed, with costs.

From the foregoing decree the complainant prays an appeal to the Court of Appeals of the District of Columbia, which is granted and the bond for costs fixed at one hundred dollars.

THOS. H. ANDERSON, *Justice.*

Memorandum.

September 27, 1904.—Appeal bond filed.

Designation for Record, etc.

Filed Oct. 1, 1904.

In the Supreme Court of the District of Columbia.

GEORGE C. HAZELTON
vs.
FRANCIS MILLER. } Equity. No. 24238.

The clerk of the supreme court of the District of Columbia will please embrace the following papers in the transcript of the record for use upon appeal in the Court of Appeals.

8 (1.) The bill and exhibits filed therewith.

(2.) The demurrer of the defendant.

(3.) The final decree of the court dismissing the bill.

Please have the record ready within forty days from the 27th day of September, or if you are unable to complete it in that time, please let us know a few days before the expiration of the time that we may have it extended.

COLE & DONALDSON.

To J. J. Darlington, Esq., attorney for defendant:

We have this 1st day of October, 1904, filed the foregoing designation for the record in the above entitled cause to be used on appeal to the Court of Appeals.

COLE & DONALDSON.

Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA, *District of Columbia,* } *ss:*

I, John R. Young, clerk of the supreme court of the District of Columbia, hereby certify the foregoing pages, numbered from 1 to 14, inclusive, to be a true and correct transcript of the record, as per directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 24,238, in equity, wherein George C. Hazelton is complainant, and Francis Miller is defendant, as the same remains upon the files and of record in said court.

Seal Supreme Court of the District of Columbia.

In testimony whereof, I hereunto subscribe my name and affix the seal of said court, at the city of Washington, in said District, this 7th day of November, A. D. 1904.

JOHN R. YOUNG, *Clerk.*

Endorsed on cover: District of Columbia supreme court. No. 1492. George C. Hazelton, appellant, *vs.* Francis Miller. Court of Appeals, District of Columbia. Filed Nov. 9, 1904. Henry W. Hodges, clerk.

9 TUESDAY, *March 21st, A. D.* 1905.

No. 1492.

GEORGE C. HAZELTON, Appellant,
vs.
FRANCIS MILLER.

The argument in the above entitled cause was commenced by Mr. H. J. May, attorney for the appellant, and was concluded by Mr. J. J. Darlington, attorney for the appellee.

10 No. 1492.

GEORGE C. HAZELTON, Appellant,
v.
FRANCIS MILLER.

Opinion.

(Mr. Chief Justice SHEPARD delivered the opinion of the court:)

This is an appeal from a decree dismissing a bill for specific performance upon a demurrer thereto.

The contract of which performance is sought to be compelled reads as follows:

"For the sum of one dollar and other valuable considerations, I hereby agree and bind myself and my heirs to sell to George C. Hazelton, and to deliver by good and sufficient deed at any time during the present session of Congress, and such additional time as may be necessary for settlement under appropriation by that Congress, part of lot numbered two (2), in square numbered one hundred and forty-three (143), being six thousand, seven hundred and twenty (6,720) feet, more or less, and all the ground owned by me in said square with the improvements thereon, for the sum of nine thousand dollars ($9,000).

"Should the said George C. Hazelton fail to take advantage of and accept this offer as above within the time mentioned, then this agreement shall be null and void.

"Witness my hand this 11th day of December, A. D. 1902.

"(Signed) FRANCIS MILLER."

Having set out the contract the bill proceeds as follows:

"4. A part of the consideration mentioned in said contract moving to the plaintiff from the defendant was services rendered both before and after the making of said contract by the plaintiff in bringing the said property to the attention of the committees of Congress as a suitable and appropriate site for a hall of records. Plaintiff, at the instance of the said defendant, who desired to sell said property at a reasonable price, had expended much time and labor and expended considerable money, prior to the making of that contract and has also subsequent thereto, in calling the attention of the committees of Congress to the eligibility and desirability of the land in said square for the purpose aforesaid, and during the two last sessions of Congress plaintiff devoted a great deal of his time to the ascertainment of the condition of the title, the condition of the land as affording a good foundation, the condition, size, and durability of the sewers in the streets surrounding said square, the kind, character, and condition of the buildings thereon, and other facts tending to show that the said square was a desirable location for said building, and furnishing them to and laying them before the said committees

of Congress in order to enable them to act intelligently upon the matter. At the first session of the 57th Congress plaintiff called the attention of the committees of Congress to said location and, at the request of the members of said committees, he ascertained and collated various facts in relation thereto, and subsequently during said session, at the like request of said committees, prepared a bill to be introduced in Congress authorizing the purchase of said square for said purpose, but the bill did not pass at that session. Subsequently at the second session of said Congress he again called the attention of the committees to the said real estate and at their like request collected and furnished them other important information in relation to it, and employed others to aid and assist him in securing such information to demonstrate to said committees the propriety of said purchase. He also, at his own expense, caused many of said facts to be put in print and furnished them to the members of said committees for their information and for the use of other members of Congress when said bill should come up for debate. At several sessions of Congress he appeared before said committees and filed briefs and made arguments, the object and tendency of which were to show that upon all of the facts presented in relation to this and other sites mentioned and discussed, the square above mentioned was better adapted to the purpose of a hall of records than any other in the city. Said committees all the time understood that he was the owner of some of said property and was acting as attorney for other owners of said real estate. At the second session of said Congress said bill was passed authorizing the purchase or condemnation of said square for the purpose aforesaid and appropriating the sum of four hundred thousand dollars ($400,000), or so much thereof as might be necessary to pay for the same. Said act provided that if the Secretary of the Treasury could by negotiation acquire said square or any part thereof at such figures as might be deemed reasonable, that he might purchase instead of condemning. After the passage of said bill, with the knowledge and acquiescence of the said Miller, the plaintiff commenced negotiations with the proper officers of the Treasury Department to make a sale of said property to the United States and on the — day of Aug. 1903, agreed with said officers upon a price which they were willing to pay for said property rather than to condemn it, which aggregated about fourteen thousand three hundred and ninety-five dollars and fifty cents ($14,395 50), and informed the defendant that such contract had been consum-

11 mated, but that it would take some time for the Treasury Department to investigate the title and make arrangements for the payment of the money, and the proper Treasury officers are now engaged in such work and the time has not yet arrived when they can properly, under said act of Congress, pay out the money for the real estate hereinbefore mentioned, and the necessary time for settlement under said appropriation has not yet expired.

"5. The plaintiff further shows that after he had informed the defendant had knowledge of the sale which he had made to the

United States of said property, the defendant intimated to the plaintiff that he did not intend to keep his contract with him, but to convey the property direct to the United States and demand the right to receive from the United States the full sum of money which the Government has agreed to pay for said lot of land, and denies the right of the plaintiff to the purchase money for which said property has sold in excess of the nine thousand dollars ($9,000)."

It is further alleged that on October 5, 1903, complainant tendered to the defendant the said sum of $9,000, and demanded the execution by him and his wife of a conveyance of the title. Among other prayers is one for an injunction restraining defendant from conveying the property to the United States and receiving any money therefor.

The demurrer raises several questions, only one of which we find it necessary to consider.

The bill was rightly dismissed if for no other reason than a want of jurisdiction in equity.

The essential foundation of the jurisdiction to entertain a bill for the specific performance of a contract is the inadequacy of the remedy at law for its breach. Ordinarily, where the contract is for the conveyance of land, it is assumed that the remedy at law is inadequate and incomplete. But in this case that inference is negatived by the express allegations of the bill. The complainant alleges that he has entered into a binding contract to convey the property to the United States for the agreed sum of $14,395.50, and seeks a conveyance from the defendant, whose solvency is not even denied, for the sole purpose of performing that contract.

Having no other purpose, and having fixed and rendered certain the damages sustained by the breach of the contract, his sole remedy is at law. Further discussion, and the citation of authorities in support of this conclusion are unnecessary.

The decree must be affirmed with costs, and it is so ordered.

Affirmed.

12 TUESDAY, *April 4th, A. D.* 1905.

GEORGE C. HAZELTON, Appellant, *vs.* FRANCIS MILLER. } No. 1492. April Term, 1905.

Appeal from the Supreme Court of the District of Columbia.

This cause came on to be heard on the transcript of the record from the supreme court of the District of Columbia, and was argued by counsel. On consideration whereof, it is now here ordered, adjudged and decreed by this court that the decree of the said supreme court in this cause be, and the same is hereby, affirmed with costs.

Per MR. JUSTICE SHEPARD.

April 4, 1905.

THURSDAY, *April 6th, A. D.* 1905.

GEORGE C. HAZELTON, Appellant,
vs.
FRANCIS MILLER. } No. 1492.

On motion of Mr. H. J. May, of counsel for the appellant in the above entitled cause, it is ordered by the court that said appellant be allowed an appeal to the Supreme Court of the United States, on giving bond for costs in the sum of three hundred dollars.

13 (*Bond on Appeal.*)

Know all men by these presents, That we, George C. Hazelton, as principal, and Henry M. Baker, as surety, are held and firmly bound unto Francis Miller in the full and just sum of three hundred dollars, to be paid to the said Francis Miller, his certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this sixth day of April, in the year of our Lord one thousand nine hundred and five.

Whereas, lately at a Court of Appeals of the District of Columbia in a suit depending in said Court, between George C. Hazelton and Francis Miller a decree was rendered against the said George C. Hazelton and the said George C. Hazelton having prayed and obtained an appeal to the Supreme Court of the United States to reverse the decree in the aforesaid suit, and a citation directed to the said Francis Miller citing and admonishing him to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date thereof;

Now the condition of the above obligation is such, that if the said George C. Hazelton shall prosecute said appeal to effect, and answer all costs if he fail to make his plea good, then the above abligation to be void; else to remain in full force and virtue.

GEORGE C. HAZELTON. [SEAL.]
HENRY M. BAKER. [SEAL.]

Sealed and delivered in presence of—
S. A. BERGEN.
H. J. MAY.

H. M. B.

Surety acceptable.

J. J. DARLINGTON,
Att'y for Def't in Error.

Approved by—
C. H. DUELL,
Associate Justice Court of Appeals
of the District of Columbia.

[Endorsed:] No. 1492. George C. Hazelton, appellant, *vs.* Francis Miller. Bond on appeal to Supreme Court U. S. Court of Appeals, District of Columbia. Filed April 8, 1905. Henry W. Hodges, clerk.

14 UNITED STATES OF AMERICA, *ss:*

To Francis Miller, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to an order allowing an appeal, filed in the clerk's office of the Court of Appeals of the District of Columbia, wherein George C. Hazelton, is appellant and you are appellee, to show cause, if any there be, why the decree rendered against the appellant, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable C. H. Duell, associate justice of the Court of Appeals of the District of Columbia, this 8th day of April, in the year of our Lord one thousand nine hundred and five.

C. H. DUELL,
Associate Justice of the Court of Appeals of the District of Columbia.

Service accepted.
J. J. DARLINGTON,
Att'y for Def't in Error.

[Endorsed:] Court of Appeals, District of Columbia. Filed Apr. 8 1905 Henry W. Hodges, clerk.

15 In the Court of Appeals, District of Columbia.

GEORGE C. HAZELTON, Appellant,
v.
FRANCIS MILLER, Appellee.

Assignment of Error for the Supreme Court of the United States, on Appeal.

Comes now the appellant, by his counsel, and respectfully represents that he feels himself to be aggrieved by the proceedings and decree of the Circuit Court of Appeals of the District of Columbia in the above-entitled cause, and assigns error thereto, as follows:

1. The court erred in affirming the decree of the supreme court of the District of Columbia, holding an equity court, and in ordering the appellant's bill to be dismissed by the court below.

2. The court erred in holding and deciding that it had no jurisdiction of the appeal in this cause for the reason that the allega-

tions of the bill show that appellant had an adequate remedy at law, and in affirming the decree of the court below, and dismissing the appeal, and ordering the bill to be dismissed by the court below upon said grounds.

3. The court erred in affirming the decree of the court below and in holding thereby that the agreement between the parties to this suit, as presented by the bill, is against public policy and illegal and void.

Wherefore the said appellant prays the honorable court to examine and correct the errors assigned, and for the reversal of the decree of the Court of Appeals of the District of Columbia entered in the above-entitled cause.

GEORGE C. HAZELTON, *Appellant*,
By HEBER J. MAY, *His Attorney*.

16 (Indorsed:) No. 1492. George C. Hazelton, appellant, *vs.* Francis Miller. Assignment or errors for S. C. U. S. on appeal. Court of Appeals, District of Columbia. Filed Apr. 8, 1905. Henry W. Hodges, clerk.

17 Court of Appeals of the District of Columbia.

I, Henry W. Hodges, clerk of the Court of Appeals of the District of Columbia, do hereby certify that the foregoing printed and typewritten pages numbered from 1 to 16 inclusive contain a true copy of the record and the proceedings of the said Court of Appeals in the case of George C. Hazelton, appellant, *vs.* Francis Miller, No. 1492, April Term, 1905, as the same remain upon the files of said Court of Appeals.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court of Appeals, at the city of Washington, this 12th day of April A. D. 1905.

[Seal Court of Appeals, District of Columbia.]

HENRY W. HODGES,
Clerk of Court of Appeals of the District of Columbia.

Indorsed on cover: File No. 19707. District of Columbia Court of Appeals. Term No. 225. George C. Hazelton, appellant, *vs.* Franci Miller. Filed April 12th, 1905. File No. 19,707.

APPELLANTS' BRIEF

FILE COPY.

Supreme Court of the United States.

OCTOBER TERM, 1905.

Office Supreme Court U. S.
FILED
MAR 7 1906
JAMES H. McKENNEY,
Clerk.

No. 225.

GEORGE C. HAZELTON, *Appellant.*

vs.

FRANCIS MILLER.

APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

BRIEF OF APPELLANT.

HEBER J. MAY,
Attorney for Appellant.

Supreme Court of the United States.

OCTOBER TERM, 1905.

No. 225.

GEORGE C. HAZELTON, *Appellant.*

vs.

FRANCIS MILLER.

APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

BRIEF OF APPELLANT.

STATEMENT.

The complainant below, who is the appellant here, filed his bill in equity in the Supreme Court of the District of Columbia holding a special term against the defendant, who is the appellee here, the object of the bill being to obtain a specific performance of a contract or option for the conveyance by the appellee to the appellant of a certain piece of real estate in the city of Washington. The contract is found on pages 4 and 5 of the record, and is as follows:

> "For the sum of one dollar and other valuable considerations, I hereby agree and bind myself and my heirs to sell to George C. Hazelton, and to deliver by good and sufficient deed at any time during the present session of Congress, and such additional time as may be necessary for settlement under appropria-

tion by that Congress, part of lot numbered two (2), in square numbered one hundred and forty-three (143), being six thousand seven hundred and twenty (6,720) feet, more or less, and all the ground owned by me in said square with the improvements thereon, for the sum of nine thousand dollars ($9,000).

"Should the said George C. Hazelton fail to take advantage of and accept this offer as above within the time mentioned, then this agreement shall be null and void.

"Witness my hand this 11th day of December, A. D. 1902.

"FRANCIS MILLER.

"Witness:

"WILL H. ALBURGER."

The bill alleges that the appellant, within the time specified in the agreement or option, elected to purchase the property therein mentioned and tendered the purchase price thereof, $9,000, and the appellee declined to accept the same and make a conveyance as therein stipulated.

The appellee filed a general demurrer to the bill (Rec. p. 6) and, upon hearing, the demurrer was sustained and the bill dismissed, without an opinion. (Rec., p. 7.)

The demurrer is general and does not show upon its face the particular grounds relied upon by the appellee, but in the brief and argument below he assigned three grounds, as follows:

1. That the contract under the allegations of the bill is against public policy and void.

2. That there is a want of mutuality and equity will not decree its specific execution.

3. That the wife is a necessary party to the bill.

Counsel for appellee also presented and discussed in his brief, in addition to the above, the following proposition:

"Was the agreement between the parties, as presented by the bill, illegal and void, under the principles of law applicable to such agreements as established by the Supreme Court of the United States and other tribunals?"

Upon the presentation of the above propositions to the Court, by oral argument and briefs, Mr. Justice Anderson passed a decree dismissing the bill, upon the ground that the agreement or option, as presented by the bill, was against public policy. At the conclusion of the oral argument in the Equity Court the learned justice who heard the cause invited briefs upon the question of a contingent fee or compensation for services in procuring legislation.

From that decree an appeal was taken to the Court of Appeals of the District of Columbia, where, upon hearing, the Appellate Court affirmed the decree of the court below, but upon a different ground, namely, for the want of jurisdiction in equity, for the reason that, upon the allegations of the bill, the appellant's sole remedy is at law (Rec. pp. 9-11). The decision of the Court of Appeals is based principally upon certain allegations contained in the fourth and fifth paragraphs of the bill, which are set out in the opinion (Rec. pp. 9-11). An appeal has been taken from the decree of the Court of Appeals (Rec. p. 12). An assignment of errors will be found on pages 13 and 14 of the record.

Two principal questions are now presented for consideration by the decision of the courts below, first, whether by the express allegations of the bill (Rec. p. 11) the appellant had an adequate, plain, and complete remedy at law, which was as practical and as efficient to the ends of justice and its prompt administration as the remedy in equity; second, whether the agreement, as presented by the bill, is illegal and void, under the principles of law applicable to said agreement or option under the decisions of the

Supreme Court of the United States and other tribunals upon the question of public policy.

The other questions raised by the demurrer as to the mutuality of the agreement, and that the wife is a necessary party to the bill, will be discussed also in this brief, although they do not seem to have been specially passed on by the courts below.

The Court of Appeals, after setting out the paragraphs of the bill, gives its reasons in its opinion for affirming the decree of the court below (Rec. p. 11) as follows:

> "The essential foundation of the jurisdiction to entertain a bill for the specific performance of a contract is the inadequacy of the remedy at law for its breach. Ordinarily, where the contract is for the conveyance of land, it is assumed that the remedy at law is inadequate and incomplete. But in this case that inference is negatived by the express allegations of the bill. The complainant alleges that he has entered into a binding contract to convey the property to the United States for the agreed sum of $14,395.50, and seeks a conveyance from the defendant, whose solvency is not even denied, for the sole purpose of performing that contract. Having no other purpose, and having fixed and rendered certain the damages sustained by the breach of the contract, his sole remedy is at law."

It is submitted that the reasons given in the opinion of the Court of Appeals for dismissing the bill upon the allegations thereof, on the ground that appellant's *sole* remedy is at law, are erroneous, when considered in connection with the authorities and the discretionary powers of courts of equity upon the subject. And it is also submitted that it was not necessary to allege the insolvency of the defendant or appellee in a bill for the specific performance of a contract and that the Court of Appeals erred in so holding in its opinion.

ARGUMENT.

First Specification of Error.

The Court of Appeals erred in affirming the decree of the court below dismissing the bill, and in holding and deciding in the first instance that it had no jurisdiction of the cause or appeal for the reason that the allegations of the bill show that the appellant's sole remedy is at law (Rec. 13-14).

As to the Adequate Remedy at Law.

The language of the opinion of the Court of Appeals, namely, that,

> "The essential foundation of the jurisdiction to entertain a bill for the specific performance of a contract is the inadequacy of the remedy at law for its breach. Ordinarily, where the contract is for the conveyance of land, it is assumed that the remedy at law is inadequate and incomplete,"

is not sufficiently broad to meet the rules and established principles of equity jurisdiction upon the special subject of the specific performance of contracts relating to real estate.

The rule laid down by this Court upon the general subject of equity jurisdiction *in Boyce's Executors* vs. *Grundy*, 3 Peters, 210, 215, has been adhered to, and is as follows:

> "It is not enough that there is a remedy at law; it must be plain and adequate, or in other words, as practical and as efficient to the ends of justice and its prompt administration, as the remedy in equity."

Tyler vs. Savage, 143 U. S. 79.95.
Lewis vs. Cocks, 23 Wall. 466, 470.
Buzard vs. Houston, 119 U. S. 347, 352.
Insurance Co. vs. Bailey, 13 Wall. 616, 621.
Drexel vs. Berney, 142 U. S., 241, 252.

In *Cathcart* vs. *Robinson*, 5 Peters, 264, 278, it is shown by the allegations of the bill, that the parties to the contract for the sale and purchase of real estate, agreed that "in further confirmation of the said agreement, the parties bind themselves, each to the other, in the penal sum of $1,000." Here the measure of damages was fixed in the agreement, as appeared from the allegations of the bill, and counsel urged that the bill ought to be dismissed because the question of the penalty, upon which the case turned, might have been recovered at law. But Mr. Chief Justice Marshall in passing upon the question said:

> "We do not think so. The right of a vendor to come into a court of equity to enforce a specific performance is unquestionable. Such subjects are within the settled and common jurisdiction of the court. It is equally well settled that if the jurisdiction attaches, the court will go on to do complete justice, although in its progress it may decree on a matter which was cognizable at law. Mr. Robinson could not have sued for the penalty at law without abandoning his right to enforce the contract of sale. He could not be required or expected to do this. Consequently, he came properly into a court of equity, and the court ought to do him justice." * * * (See also, Franklin Tel. Co. vs. Harrison, 145 U. S., 459.)

The Court admitted in the above case that there was a remedy at law for the recovery of the $1,000 penalty, and in both its opinion and decree gave the complainant the preference of pursuing that remedy by dismissing his bill without costs and without prejudice (p. 282).

The case at bar falls within the rules above laid down by Mr. Chief Justice Marshall upon the subject of equity jurisdiction. The controversy here is solely between the appellant and appellee, and no third person can be affected by its settlement in equity, and equity

will look through the form of the transaction and adjust the equities of the parties.

Drexel vs. Berney, 122 U. S. 241, 254.

Smith vs. Felton, 43 N. Y. 419.

In Willard vs. Tayloe, 8 Wall., 557, 564-567, this Court reviewed the English and American authorities upon the subject of equity jurisdiction to decree the specific performance of contracts for the sale of real estate, and says:

> "The discretion which may be exercised in this class of cases is not an arbitrary or capricious one, depending upon the mere pleasure of the Court, but one which is controlled by the established doctrines and settled principles of equity. No positive rule can be laid down by which the action of the Court can be determined in all cases. In general it may be said that the specific relief will be granted when it is apparent, from a view of all the circumstances of the particular case, that it will subserve the ends of justice; and that it will be withheld when, from a like view, it appears that it will produce hardship or injustice to either of the parties. It is not sufficient, as shown by the cases cited, to call forth the equitable interposition of the Court, that the legal obligation under the contract to do the specific thing desired may be perfect. It must also appear that the specific enforcement will work no hardship or injustice, for if that result would follow, the Court will leave the parties to their remedies at law, unless the granting of the specific relief can be accompanied with conditions which will obviate that result. If that result can be thus obviated, a specific performance will generally in such cases be decreed conditionally." * *

The Court's attention is especially invited to the language in the above opinion which is clearly applicable to the case under consideration, to wit:

> "It is not sufficient, as shown by the cases cited, to call forth the equitable interposition of the Court,

> that the legal obligation under the contract to do the specific thing desired may be perfect. It must also appear that the specific enforcement will work no hardship or injustice, for if that result would follow, the Court will leave the parties to their remedies at law, unless the granting of the specific relief can be accompanied with conditions which will obviate that result."

In Hodges vs. Kowing, 58 Conn. 12, 21, the contract was a simple one, signed by the vendors only, no writing having been signed by the vendee, the consideration being $9,500, the purchase price of the property: the Court, in enforcing the specific performance of the contract said:

> "In the action at law for the breach of the contract the plaintiff could only recover the excess if any of the sum agreed to be paid for the land above its market value when the contract was to be performed. Such a remedy is manifestly inadequate, the courts of equity therefore hold, as a general rule, that when a contract for the sale of real estate has been fairly entered into, the party contracting to sell, as well as the party contracting to buy, is entitled to have it specifically performed."

Upon a review of the allegations of the whole bill or of the parts specifically referred to in the opinion of the Court of Appeals (Rec., p. 11), it is submitted that the enforcement of the agreement by specific performance, can work no such hardship on the appellee as to take away from the court its discretionary equity jurisdiction. The hardship will fall upon the appellant who is asking for the enforcement of the agreement, if the equity jurisdiction is denied. If the agreement shall be enforced by a decree of the court the appellant will get his deed to the property, which will enable him to

fulfill his promise to the Government, and no hardship will be entailed upon the appellee by requiring him to comply with his agreement in good faith.

The attempt of the appellee to arbitrarily avoid the performance of his agreement comes clearly within the doctrine of this Court laid down in *Union Pacific Ry. Co.* vs. *Chicago, &c., Ry. Co.*, 163 U. S., 564, 600, namely, that the exercise of jurisdiction by courts of equity—

> "prevents the intolerable travesty of justice involved in permitting parties to refuse performance of their contracts at pleasure by electing to pay damages for the breach."

The contracts under consideration in the above case, and which it was attempted to avoid, were solicited by the Pacific Company upon terms substantially proposed by itself, and the court says (p. 604) that,

> "The conduct of the Pacific Company was not such as to commend itself to a court of equity." Why does not this reasoning apply to the facts in the case now being considered?

The rule laid down in the text books upon the subject are in consonance with the decisions, and both justify a court of equity in exercising jurisdiction in a case like the one now under consideration.

In Story's Equity Jur., Sec. 746 (vol. 2) it is said:

> "In regard to contracts respecting personal estate it is (as has been already intimated) generally true that no particular or peculiar value is attached to any one thing over another of the same kind, and that a compensation in damages meets the full merits as well as

> the full objects of the contracts. If a man contracts for the purchase of a hundred bales of cotton, or boxes of sugar, or bags of coffee, of a particular description or quality, if the contract is not specifically performed, he may generally, with a sum equal to the market price, purchase other goods of the same kind of a like description and quality, and thus completely obtain his object, and indemnify himself against loss. But in contracts respecting a specific messuage or parcel of land the same considerations do not ordinarily apply. The locality, character, vicinage, soil, easements or accommodations of the land generally may give it a peculiar and special value in the eyes of the purchaser, so that it can not be replaced by other land of the same precise value, but not having the same precise local conveniences or accommodations; and therefore a compensation in damages would not be adequate relief. It would not attain the object desired, and it would generally frustrate the plans of the purchaser. And hence it is that the jurisdiction of Courts of Equity to decree specific performance is in cases of contracts respecting land universally maintained."

Compensation for damages would not be adequate relief for the appellant in this case. As stated in Snell's Equity, p. 461:

> "It would not attain the object desired, and would generally frustrate the plans of the purchaser."

The doctrine on this subject is as well established as any principle of equity jurisprudence and is the same in both the State and Federal Courts. Willard says after adverting to contracts relative to personal property:

> "But it is otherwise with respect to contracts relative to real estate. Here the jurisdiction to enforce performance is universal not because of the real nature of the land but because damages at law may not be a complete remedy to a purchaser to whom the land may have a peculiar and special value."
>
> Willard's Eq., p. 279.

What do the allegations of the bill, as admitted by the demurrer, show the conduct of the appellee to have been in this case? Does his conduct as admitted commend itself to a court of equity? He admits that he desired to sell his property at a reasonable price (Rec. p. 2); that he signed the agreement fixing that price at $9,000 (Rec. 1-2); that all of the services performed by appellant before the committees of Congress and the Treasury Department concerning the lot mentioned in the agreement in connection with the sale of square No. 143 to the United States for a Hall of Records are true (Rec. 2-3); that after the enactment of the law by Congress authorizing the purchase or condemnation of square No. 143 for said purpose, the appellant, with his knowledge, negotiated a sale of said property to the Government for a price which the Government was willing to pay rather than resort to condemnation procedings (Rec. 3); that after he had received information of the sale made by appellant to the Government he intimated that he did not intend to keep his contract, but intended to convey the property described in the agreement directly to the United States, and demand the purchase money which the Government had agreed to pay appellant for it, and denied the right of the appellant to the purchase money for which said property sold in excess of $9,000 (Rec. 3); that he has tendered a deed to the United States for said property (Rec.3); that appellant, on October 5, 1903, tendered the sum of $9,000 to the appellee and demanded a sufficient deed for the property, which was refused (Rec. 3-4).

It will be observed that the pleadings do not show that any intimation was made by the appellee that he intended to attempt to repudiate his contract until after he had learned that the Government, rather than condemn the property, would be willing to pay $14,395.50 for it, this being the basis of the purchase price which was fixed by the Gov-

ernment for the purchase of the whole of square No. 143 in preference to condemning the property, and not as a separate price for appellee's lot, this arrangement with the officers of the Treasury Department having been the result of the work of the appellant and within the purview of his agreement with the appellee and of the whole transaction between the parties to it.

It will also be observed that the terms of the agreement provide for the transaction which actually took place by the sale of the property to the Government by the appellant. The appellee, Francis Miller, binds himself and his heirs to George C. Hazelton, the appellant, "to deliver by good and sufficient deed at any time during the present session of Congress, and such additional time as may be necessary for settlement under appropriation by that Congress," the property described. This expresses sufficiently the intention and understanding of the parties that appellant entered into the agreement for the purpose of selling the property to the Government in connection with square No. 143 for a Hall of Records, and the appellee understood such to be the facts of the transaction. If this is so, why should the appellant be denied the equitable jurisdiction of the Court, because he alleges the facts in his bill? The sale to the Government was clearly a part of the agreement and the surrounding circumstances of the case, and should not have been held as a reason for denying the equity jurisdiction of the Court, as was done by the Court of Appeals (Rec. p. 11).

It will also be observed by the allegations of the bill that the appellee refused to accept the $9,000 tendered, and to deliver the deed to the appellant and that the appellee "denies the right of the plaintiff to the purchase money for which said property has sold in excess of nine thousand dollars ($9,000) (Rec., 3).

The sale of the property to the Government, and the consideration to be received therefor, and the treatment of the

property as his own for said purposes were objects clearly within the existing agreement, and the carrying out of those objects within the limited time, devolved upon the appellant in order to carry out the intention of the parties and to prevent, so far as appellant was concerned, the agreement from becoming null and void (Rec., p. 2, 4-5); that this is so, is admitted by the appellee by his knowledge of, and acquiescence in, all of the proceedings and transactions of the appellant with the officers of the Government in effecting the said sale (Rec., p. 3). It is clear that it was not the intention of the able counsel who drew the bill, to bring into the case the question of the measure of damages or compensation, by the allegations that appellant had sold the property to the Government, at a fixed price, and that appellee had attempted to collect from the United States the purchase money in excess of $9,000, thereby denying the rights of the appellant under his agreement, but that these allegations of the bill were intended to show, and do show, the complete transaction between the parties, and the extent to which the appellee has gone for the purpose of repudiating a reasonable agreement which had been honestly entered into by him, and which has been accepted and completed by appellant. This is a case that, as heretofore stated, falls within what this Court said upon the subject of equity jurisdiction to decree specific performance, in *Union Pacific Ry. Co.* vs. *Chicago, &c., Ry. Co.*, 163 U. S., 600.

It does not seem therefore that the strenuous deductions drawn by the Circuit Court of Appeals from the allegations of the bill that "having no other purpose, and having fixed and rendered certain the damages sustained by the breach of the contract, his sole remedy is at law," are sustained by the text writers and the decisions on the subject. Nor are they sustained by the allegations of the whole bill to the effect that there was no other purpose therein than the fixing of the measure of damages,

the chief object of the bill being to obtain the deed and title to the real estate described in the agreement or option, and to which appellant is entitled, for the purpose of carrying out the plan and transaction which appears to have been well understood by both parties and which the appellee by his conduct is attempting to "frustrate."

The mutual conditions upon which the appellant purchased the real estate was the payment to the appellee of an actual consideration of $9,000 for a good and sufficient deed—

> "At any time during the present session of Congress, and such additional time as may be necessary for settlement under appropriation by that Congress.'

The appellant entered into and accepted the agreement or option because he wanted the land for the purpose of selling it in connection with the whole of square 143 to the Government for a Hall of Records, and he still wants the land for the purpose of carrying out his arrangement with, and promises to, the Government in that respect.

Any increase in the price of the property in the event of its sale to the Government for the purpose intended was doubtful, and it can not be said that it entered materially, if at all, into the agreement or option between the parties at the time it was signed by the appellee, who fixed his own value on the property. If the appellant failed to take advantage of the agreement by perfecting it on his part within the time limited by its own terms, the agreement was to become null and void; but appellant complied fully with its terms.

Appellant throughout the whole transaction, subsequent to the date of the agreement, treated and dealt with the property described therein as his own, as it appears he had a right to do under the authorities (Brewer vs. Herbert, 30

Md. 301; 22 Am. & Eng. Encyc. of Law (1st Ed.) p. 925, par. 3 and cases cited under note 1; also, page 971, Note 2; Story's Eq. 790), and after the passage of the bill by Congress he, by virtue of the existing rights under the agreement, commenced negotiations with the proper officers of the Treasury Department, with the knowledge and acquiescence of the appellee, to make a sale of the property to the United States, which was accomplished, and the appellee, upon being notified of the sale did not cancel or withdraw the agreement or option, or give notice that he would do so, but simply intimated that he did not intend to keep his contract, but intended to deal directly with the United States himself in the matter, and has endeavored to do so. It is true he refused to accept the purchase price of $9,000 when tendered, but the refusal of the appellee to accept the purchase money tendered will not destroy the mutuality or stipulations of the agreement or offer to sell, or amount to a withdrawal of such offer.

Waterman on Spec. Perf., pp. 267-8, note 1.

It would seem that this is a case in which the appellant should not be required, even upon the allegations of his bill, to abandon "his right to enforce his contract of sale." He could not have sued at law without doing this. He "came properly into a court of equity, and the court ought to do him justice." (Cathcart vs. Robinson, 5 Pet. 264, 278).

The Equity Court took jurisdiction of the case, in so far as the question of adequate remedy at law is concerned, whether that objection was raised at the earliest opportunity or not (Allen vs. Pullman, &c., Co., 139 U. S., 658, 662), and determined it on the facts as alleged in the bill and admitted by the general demurrer, and to that extent decided upon the facts and merits of the case on the question of public policy. Was it not too late under these circumstances for

the Appellate Court, in the first instance, to affirm the decree of the court below upon the ground that there is an adequate remedy at law? And if the question was raised in the Court of original jurisdiction and that Court took jurisdiction of the case for the purpose of determining it upon another ground, practically upon the facts, would it not be equitable between the parties in a case like this one, for the Appellate Court to exercise its discretionary jurisdiction and do complete justice between the parties, as was done in Cathcart vs. Robinson? We are well aware of the class of cases that holds that "if the Court in looking into the proofs, found none of the matters which would make a proper case for equity, it would be the duty of the Court to recognize the fact and give it effect, though not raised by the pleadings nor suggested by counsel," but we do not think the rule applies to the facts of this case (Allen vs. Pullman, &c., Co., 139 U. S. 658, 662, and cases cited; Tyler vs. Savage, 143 U. S. 79, 97).

The equity jurisdiction should be exercised and maintained where, as in this case, time, expense, and the multiplicity of suits between the same parties will be saved by it, and especially where the rights of all the parties concerned can be settled in one litigation.

Oelrichs vs. Spain, 15 Wall, 211, 228.

Pom. Eq. 295, 295.

In *Sugden on Vendors,* Chap. 5, Sec. 3, par. 25, it is said that "a court of equity does not affect to weigh the actual value, nor to insist upon an equivalent in contracts, where each party has equal competence. When undue advantage is taken, it will not enforce the contract; but it can not listen to one party saying that another man would give him more money or better terms than he agreed to take. It may be an improvident contract; but improvidence or inadequacy do not determine a court of equity against decreeing specific

performance." *Sullivan vs. Jacob*, 1 Malloy, 472, 477. So, in *Lee vs. Kirby*, 104 Mass., 420, 428: "The question of the want of equality and fairness, and of the hardship of the contract, should, as a general rule, be judged of in relation to the time of the contract, and not by subsequent events" * * *.

Franklin Telegraph Co. vs. Harrison, 145 U. S., 459, 473.

The decree of the equity court, in special term, having been rendered without words of qualification, such as "without prejudice," or other terms indicating a right or privilege to take further legal proceedings on the subject, is presumed to be a decree rendered on the merits of the case.

Durant vs. Essex Co., 7 Wall., 107, 109.

Nelson Lyon vs. Perin, &c., Co., 125 U. S., 701, 702.

In view of the above authorities, if the decree of the equity court, in special term, upon the merits of the case, as affirmed by the Court of Appeals upon a jurisdictional question, without modification, shall be allowed to stand in its present form, would the appellant have a remedy at law? It seems not.

As to the Solvency of the Defendant.

Especial attention is invited to the part of the opinion of the Court of Appeals where it states that the solvency of the defendant is not even denied in the bill (Rec., p. 11). This holding of the court seems to be erroneous.

With entire respect for the Court of Appeals it is insisted that the solvency of the defendant is not a factor in actions of this character. The right to ask a court of equity to enforce a contract for the conveyance of real estate does not depend upon the financial responsibility of the defendant, but on other considerations, and an allegation as to his solvency or insolvency is no part of a bill in equity for specific performance.

If such a rule shall be applied, then a large number of parties, who deal with solvent parties, will be deprived of their remedy. This case is itself an example. How could the plaintiff have alleged in his bill, under oath or otherwise, that the defendant was insolvent, when the allegations of the bill itself show that the defendant is worth at least $9,000, and the object of the bill is solely for the purpose of enforcing the specific performance of the agreement as to the land, and not for the recovery of damages or compensation. According to the forms prescribed in Daniel's Ch. Plead. and Prac., Vol. 3, 6th Am. Ed., Chap. 2 (1894) no such allegation is necessary.

Second Specification of Error.

(a) The Court of Appeals erred in affirming the decree of the court below and in holding thereby that the agreement between the parties to the suit, as presented by the bill, is against public policy and illegal and void.

(b) The Court of Appeals erred in affirming the decree of the Supreme Court of the District of Columbia, holding a special term as an equity court, dismissing appellant's bill (Rec., 13-14).

AS TO THE QUESTION OF PUBLIC POLICY.

The contract is not against public policy and is valid and binding upon the appellee.

This agreement being for the sale of real estate the consideration therefor is placed at "one dollar and other valuable considerations." The condition upon which the appellant was to purchase the real estate was the payment to the appellee of an actual consideration of $9,000 for a good and sufficient deed—

> "At any time during the present session of Congress, and such additional time as may be necessary for settlement under appropiation by that Congress."

If he failed to take advantage of or accept the offer within the time as limited, the agreement or offer was to be null and void. After the appropriation had been made by Congress, and a settlement had been agreed upon by the Treasury Department with the appellant within the limitation of time specified in the agreement, and the appellant had accepted the offer contained in the agreement, the appellee refused to carry out the terms thereof (Rec. p. 3). It will be observed that there is no obligation on the part of the appellant to perform any service whatever before Congress or its committees in order to accept or comply with the terms of the agreement. He would be entitled to a specific performance of the agreement upon his acceptance of the offer therein if he had not appeared before the committees of Congress or performed a single act of service there. But, inasmuch as the appellee's lot, described in the agreement (Rec. p. 3, 4, Exhibit A), and to which appellant held the right of purchase, was in square 143, in which was also located the property of the appellant, and Congress was considering the purchase or condemnation of the said square for a Hall of Records, the appellant did, considering all the surrounding facts in the premises, as well as his right to purchase said lot from the appellee, take an active interest in presenting to the committees of Congress the facts concerning the lot mentioned in said agreement as alleged in his bill, treating the same as his own, and in the same manner that he presented the facts in regard to his own property to which he held title, located in said square (Rec. p. 3). The appellant has fairly and honestly stated in his bill the acts performed by him, and has treated them as a part of the consideration of the agreement, although the actual consideration for the lot was placed at $9,000, which was agreed upon as its fair value at the time and the price at which appellee was willing to sell it (Rec., pp. 2-3, par. 4).

Of course, it is not contended here that a party may resort

to vicious practices that invade public policy in the procurement of legislation affecting his own or any other interests; but it is contended that what the appellant did, as alleged in his bill, was not only lawful and legitimate, but in his own interest in such a manner as to debar the appellee from taking advantage of it as a defense in equity, inasmuch as the appellee had knowledge of the acts of appellant and had sold the property to the appellant for a consideration of $9,000, and his silence and acquiescence throughout the proceedings was an admission that the lot belonged to appellant upon his compliance with and acceptance of the terms of the said agreement.

The appellant alleges (Rec. pp. 2-3, par. 4) that he brought the property to the attention of the committees of Congress; that he expended time and labor, and considerable money, prior to the agreement with the appellee and subsequent thereto, in calling attention of the committees of Congress to the eligibility of *square 143;* that during the last two sessions of Congress he devoted a great deal of time to the ascertainment of the condition of the said land as affording a good foundation, as to the condition, size and durability of the sewers and streets surrounding said *square,* and the character of the buildings thereon, and other facts tending to show that said *square* was a desirable location for a Hall of Records, and furnishing them to, and laying them before, the committees of Congress; at the first session of the Fifty-seventh Congress he called the attention of the committees of Congress to said location, *and at the request of the members of said committees,* he collated various facts in relation thereto, and subsequently, *at a like request of the said committees,* during said session, prepared a bill to be introduced in Congress authorizing the purchase of said *square,* but the bill did not pass at that session; at the second session of the same Congress he again called the attention of the committees of Congress to the real estate, and *at their*

like request collected and furnished them other information in relation to it, and employed others to assist him in securing information and demonstrating to said committees the propriety of said purchase; he also, at his own expense, caused many of said facts to be printed, and furnished them to the members of said committees for their information, and for the use of other members of Congress through said committees when the bill should come up for debate; he appeared before said committees of Congress and filed briefs and made arguments to show that upon all the facts presented relating to the sites mentioned for a Hall of Records that the *square* above-mentioned was better adapted for the purpose than any other; the committees understood all of the time that appellant was the owner of some of the property and was acting as attorney for some of the other owners; at the second session of said Congress a bill was passed authorizing the purchase or condemnation of said *square* for a price not to exceed $400,000 (32 Stat., pp. 1039, 1212). The said act provided that if the Secretary of the Treasury could, by negotiation, acquire said square, or any part thereof, at such figures as might be deemed reasonable, that he might purchase instead of condemning such property. The appellant, after the passage of said act with the knowledge and acquiescence of said appellee, and without objection or withdrawal of the offer to sell on his part, and also without any intimation from appellee up to said time that he intended to attempt to repudiate his agreement to sell to the appellant for any reason whatever, commenced negotiations, within his rights and claim of ownership under said agreement, with the proper officers of the Treasury Department to make a sale to the United States of the lot described in the "Agreement to Sell," and agreed with the said officers to sell the same to the Government for the price of $14,395.50, and advised the appellee of the facts of the sale and the surrounding circumstances (Rec. p. 3).

When the appellee had received knowledge of the sale of the lot to the United States by the appellant he, for the first time, without giving any excuse whatever for his conduct, intimated that he did not intend to keep his agreement, notwithstanding it was by its terms in full force, but declared, without any withdrawal of said offer, his intention of conveying the said lot directly to the United States and of receiving from the Government the full sum of money which had been agreed upon as the purchase price by the appellant and the proper authorities of the United States, and denied informally all the rights of appellant under his said agreement (Rec. p. 3, par. 5).

The appellee then proceeded, regardless of his agreement, and the rights of said appellant, and without having withdrawn the agreement and offer to sell as aforesaid, to deal directly with the Government for the purpose of collecting the $14,395.50, which belonged to said appellant, as the equitable owner of the property and which was the fruit of the services and negotiations of the appellant under the agreement and transaction between the parties. The appellee has by his actions, tied up and delayed the completion of the sale of the property to the Government (Rec. p. 3).

The appellant then tendered to the appellee the $9,000, in accordance with the terms of the agreement, and thereby fully accepted the offer therein contained and completed the transaction, and demanded the good and sufficient deed stipulated for therein; but the appellee, although he had not withdrawn the offer to sell, refused to receive the money or deliver the deed, and the bill herein was brought to enforce the specific performance of said agreement (Rec. pp. 4-5). The refusal of the appellee to accept the purchase money tendered will not destroy the mutuality or stipulations of the agreement or offer to sell, or amount to a withdrawal of such offer (Waterman of Spec. Perf. pp. 267-8, note 1).

The appellee demurred to the bill upon the ground set out in his brief, and which is presented hereafter (Rec. p. 6). The court below sustained the demurrer to the bill, but delivered no opinion, and the case is before this Court on the bill and demurrer from the decree sustaining said demurrer (Rec. p. 7).

The points presented for discussion in appellant's brief below were as follows:

1. Is the agreement illegal and void as being against public policy?

2. Are the acts performed by the plaintiff, as alleged in his bill, in contravention of public policy?

Counsel for appellee proceeded in his brief to limit the discussion on this point to the following general proposition:

> "Was the agreement between the parties, as presented by the bill, illegal and void, under the principles of law applicable to such agreement, as established by the Supreme Court and other tribunals?"

Other questions were argued in support of the demurrer, which will be noticed in their order.

The agreement is one for the sale of real property by the appellee, and an option on the part of the appellant to buy it upon the mutual conditions and promises stipulated. It is not an agreement on the part of the appellant to procure legislation of Congress for the benefit of the appellee upon a contingent fee. The sum appellee is to receive in consideration of the deed to the lot is fixed absolutely at $9,000, which does not depend upon any contingency, except the performance of the mutual obligations and promises between the parties. The reference to an appropriation of Congress and an additional time for settlement in reference thereto, is only a *limitation* upon the option of the appellant to comply with the agreement. It is provided by the express terms of the

agreement that if the appellant should fail to take advantage of the conditions therein, or to accept the offer, that is, to pay the $9,000 within the time mentioned, that the agreement shall be null and void (Rec. p. 5, Exhibit A). The appellant could have exercised his right to accept the offer and to take the appellee's deed under the agreement at any time for $9,000, regardless of legislation by Congress. The agreement differs materially, therefore, from those that have been held to invade the principle of public policy, as we shall endeavor to show hereafter by a reference to, and comparison with, some of the contracts that have been so held void as against public policy in the leading cases.

The agreement is complete within itself, and leaves nothing to implication or inference. It can not well be tortured ingeniously into something that was not meant by the parties when it was entered into by them. It contains a consideration of $1, also other valuable considerations, an actual consideration of $9,000, which sum was to be paid by appellant for the deed or lot within the time limited. The appellant was to take advantage of and accept the offer within the time mentioned, or the agreement was to be null and void, and he offered to comply with the payment by tendering the $9,000, within the life and limitation of such agreement (Rec. pp. 4, 5, 6). He has, on his part, therefore, complied with the obligations of the agreement. He has alleged, in his bill, however (Rec. p. 2, par. 4), that a part of the consideration of the agreement consisted of certain acts and services rendered by him before the committees of Congress in the sale of square 143, in which the lot described in the agreement is situated, to the United States for a Hall of Records.

This is a case, in which the specific thing contracted for is wanted, and not mere pecuniary compensation (Adams Eq. *p. 83). The specific prayer of the bill is for a proper decree to require the defendant to convey to the plaintiff a good

record fee simple title to the property (Rec. 4). The prayer for a restraining order and perpetual injunction was abandoned.

It is contended at the outset that the relation of attorney and client never existed between the appellant and appellee in respect to this agreement or transaction. No such relation is shown by the agreement or allegations of the bill. The argument and authorities are presented therefore on this point subject to this contention.

Was the agreement as presented by the bill illegal and void under the principles of law applicable to such agreements, because it is such as to incite the appellant to illegal and prohibited conduct?

The case of Tool Company vs. Norris, 2 Wall. 45, is one of the cases that has been very largely relied on by counsel for appellee. The agreement in that case, and the facts surrounding it, are clearly different and distinguishable from the agreement of the parties and the facts surrounding the case at bar. That case was tried before a jury, and came to the Supreme Court upon error assigned for refusal to give one of the instructions to the jury, which raised the question as to whether *an agreement for compensation to procure a contract from the Government to furnish its supplies, can be enforced by the courts.* The Norris contract was for the sale of 25,000 muskets to the War Department, within a certain period, at the rate of $25 a musket, upon the expressed condition that in case he obtained the contract he should receive compensation for his services proportionate to its extent (p. 46).

The statement of the case shows that Norris's conduct in procuring his contract from the Secretary of War was such as to bring the contract within the inhibition of public policy. He had no agreement, as appellant has in this case, *to buy the property which was to be sold to the United States,* for an adequate consideration fixed by the appellee

himself. Norris's services, and claim to compensation, were based upon a contingent fee for influence alone which he proceeded to obtain, and which the court undoubtedly took into consideration in determining the case, for such acts or services are set out in the statement of the case at pages 46-47, as follows:

> "Norris himself, it appeared, though not having any imputation on his moral character, was a person who had led a somewhat miscellaneous sort of a life, in Europe and America. Soon after the rebellion broke out, he found himself in Washington. He was there without any special purpose, but, as he stated, with a view of '*making* business—anything generally;' 'soliciting acquaintances;' 'getting letters;' 'getting an office,' etc. Finding that the Government was in need of arms to suppress the rebellion, which had now become organized, he applied to the Providence Tool Company, already mentioned, to see if they wanted a job, and made the contingent sort of contract with them just referred to. He then set himself to work at what he called, 'concentrating influence at the War Department,' that is to say, to getting letters from people who might be supposed to have influence with Mr. Cameron, at that time Secretary of War, recommending him and his objects. Among other means, he applied to the Rhode Island Senators, Messrs. Anthony and Simmons, with whom he had got acquainted, to go with him to the War Office. Mr. Anthony declined to go; stating that since he had been Senator he had been applied to some hundred times, in like manner, and has *invariably* declined, thinking it discreditable to any Senator to intermeddle with the business of the departments. 'You will certainly not decline to go with me, and introduce me to the Secretary, and to state that the Providence Tool Company is a responsible corporation.' 'I will give you a *note*,' said Mr. Anthony. 'I do not want a *note*,' was the reply; 'I want the weight of your *presence* with me. *I want the influence of a Senator.*' 'Well,' said Mr. Anthony, '*go to Simmons.*' By one means and another, Norris got influential introduction

> to Mr. Secretary Cameron, and got the contract, a very profitable one; the Secretary, whom on leaving he warmly thanked, 'hoping that he would make a great deal of money out of it.'"

The contract set out in the counts of the declaration was for a compensation *contingent* upon Norris's procuring an order from the Government for muskets for the Tool Company; *reliance on this contingent sort of contract running through all the counts of the declaration* (p. 47). Mr. Justice Field, at the outset of his opinion (p. 53), says that the corporation relied upon the proposition of law that an agreement of the character stated, that is, an agreement for compensation to procure a contract from the Government to furnish its supplies, is against public policy and void. The counts of the declaration show that Norris's agreement was based solely on a contingent compensation *and nothing else*. And the methods used to procure the contract from the Department are disclosed by the evidence.

The court, after having stated (p. 54) that it had not been claimed at the trial that Norris had rendered any other services than those which resulted in the procurement of the contract for the muskets, proceeded to apply the law to the contract under consideration, namely, one for purely contingent compensation, and nothing else, and held that agreements, like the Norris agreement which was under consideration, tend to introduce personal solicitation and personal influence as elements in the procurement of such agreements and lead to the inefficiency in the public service and to unnecessary expenditures of public funds.

The agreement of the appellee with the appellant can not be classed with the Norris's agreement; nor can the acts and services of the appellant, mentioned in his bill, be classed with the acts and services of Norris. The appellant called the attention of the committees of Congress to square 143 as a suitable site for a Hall of Records. He owned

property in that square. What he did after that was at the request of said committees and for the purpose of aiding them, in good faith, in the selection of the site for the Hall of Records, and for the consideration "of the public good and the best means of advancing it." There is nothing to show, or which tends to show, as there was in Tool Company vs. Norris, that the appellant by his agreement, either directly or by implication, or by his acts and services, tended or intended to divert the attention of the legislators or the committees of Congress from their high duties, or to mislead their judgments, or to substitute other motives for their conduct than the advancement of the public interests (pp. 54-5), but that on the contrary the acts and services performed by him were for the purpose of aiding them in the discharge of their duties; to aid them to reach correct and honest judgments and the advancement of the public interests.

If the agreement between the parties to this suit is to be construed apart from the facts as alleged in the bill which support its validity and the validity of the transaction, it is submitted that there is no such "corrupting tendency" in it as to make it either directly or indirectly analogous to the Norris contract, which was admittedly "an agreement for compensation to procure a contract from the Government to furnish its supplies." The agreement here can not be held, or construed, to have been entered into by the parties with any such thought or intention, or for any such like purpose. It is not therefore of the class of agreements which are "void as against public policy, without reference to the question whether improper means are contemplated or used in their execution." There is nothing in the language or terms of the agreement to place it in that category.

The only Federal case (Marshall vs. B. & O. R. R. Co., 16 How. 314) cited to support the doctrine of the opinion

in Norris's case is based upon a special contract, providing absolutely for a contingent compensation, and in which is disclosed a deplorable state of facts as alleged in the declaration.

The contract in Marshall vs. B. & O. Co., *supra*, was contingent upon the procurement of specific legislation mentioned in the contract, from the Virginia legislature for the benefit of the railroad company; $50,000 in bonds was to be paid for such services, upon the condition expressed in the resolution that if no such law as the one specified should pass, or if any laws passed should not be accepted or adopted or used by the stockholders, the agent, Marshall, should not be entitled to receive any compensation whatever for services or expenses (p. 330). It is shown from the record that the compensation in this case was not only contingent, but a most vicious and baneful state of facts is disclosed as having entered into the contract. It is shown (p. 333) that the following things were considered as having been incorporated into the contract, namely, that the mass of the members of the legislature were "careless and good natured; that they engaged in idle pleasures;" that they were capable of being "moulded like wax" by the "most pressing influences;" that to get the vote of this careless mass, "efficient means" must be adopted; that through their "kind and social dispositions" they may be approached and influenced to do anything not positively wrong, "where they can act without fear of their constituents;" that to accomplish success it was necessary to have "an active, interested, and well organized influence about the house;" that these agents "must be inspired with an earnest, nay, anxious wish for success," and "and have their whole reward depending on it;" "give them nothing if they fail, and endow them richly if they succeed;" "stimulate them to active partisanship by the strong lure of high profits;" that in order to "requisite secrecy" the company should know but one agent, etc.; that

the cost of this will "necessarily be great" as the result can be obtained "only by offers of high contingent compensation;" that high services can not be had at a low bid; that he would not willingly undertake the business unless "provided with a fund of at least $50,000." The contract with the company was made on the basis of the communication set forth above.

The issue that arose in the Marshall case was as to whether the contract sued on was contrary to the policy of the law, and the case was brought to the Supreme Court upon exception and error assigned upon the following instruction:

> "1. If at the time the special contract was made, upon which this suit is brought, it was understood between the parties that the services of the plaintiff were to be of the character and description set forth in his letter to the president of the railroad company, dated November 17, 1846, and the paper therein inclosed, and that, in consideration of the contingent compensation mentioned in the contract he was to use the means and influences proposed in his letter and the accompanying paper, for the purpose of obtaining the passage of the law mentioned in the agreement, the contract is against the policy of the law, and no action can be maintained" (pp. 333-4).

The second and third instructions present a state of facts for legal decision, where no agreement existed, and for that reason are not applicable here.

The court then reviews (p. 333) the law upon the subject of contracts the object of which is to do illegal acts, or the ultimate or probable tendency of which is to sully the purity or mislead the judgments of those to whom the high trust of legislation is confided, but states what we assert would be the true position of the appellant here, under the

agreement and the allegations of his bill if he had been the attorney or agent of appellee, which he was not, as follows (p. 335):

> "All persons whose interests may in any way be affected by any public or private act of the legislature, have an undoubted right to urge their claims and arguments, either in person or by counsel professing to act for them, before legislative committees as well as in courts of justice. But where persons act as counsel or agents, or in any representative capacity, it is due to those before whom they plead or solicit, that they should honestly appear in their true characters, so that their arguments and representations, openly and candidly made, may receive their just weight and consideration."

The opinion also refers to the prohibitions of the act of 1853, c. 81 (10 Stat. 170); and also cites cases from which it sums up three propositions, namely:

> "1st. That all contracts for contingent compensation for obtaining legislation, *or* to use personal or any secret or sinister influence on legislators, is void by the policy of the law.
>
> "2d. Secrecy as to the character under which the agent or solicitor acts tends to deception, and is immoral and fraudulent; and, where the agent contracts to use secret influences, or voluntarily, without contract with his principal, uses such means, he can not have the assistance of a court to recover compensation.
>
> "3d. That what, in the technical vocabulary of politicians, is termed 'log-rolling,' is a misdemeanor at common law, punishable by indictment."

It is contended that appellant's agreement does not fall under these propositions. It requires a very large stretch of the imagination to claim that it is for a contingent compensation—a thing that from anything that can be gathered from its conditions was not in the thoughts or minds of the parties when it was entered into. Nor can anything be gath-

ered from the agreement or its tendency to show that appellant was to use "personal," "secret," or "sinister influences" to influence Congress; in fact, the allegations of the bill, which are admitted by the demurrer, show that no such means were used. There was no secrecy concerning the actions or services of appellant before the committees, nor any "log-rolling" or personal solicitations of members of Congress, but everything the appellant did was open, and with the full understanding by the committees as to his position in appearing before them, and the services that were being rendered by him. Some, if not all, of such services were performed at the request of the committees themselves.

We repeat that the agreement between the appellant and appellee, being one for the sale and purchase of real estate, without any specific agreement therein for a contingent fee, or any specific agreement that the appellant was to perform services before Congress or its committees, is such an agreement as does not impose upon the appellant the obligation to perform any such services before accepting the terms thereof, and that he could, considering all of the provisions of the contract together, have exercised his right to have accepted and closed the terms of the agreement by buying or offering to buy said property for $9,000, regardless of any such legislation, and that he could, at any time, without having performed any such services, have had specific performance of the agreement by complying with the terms thereof. The consideration can hardly be said to be nominal when the price of the property is fixed therein at $9,000, and in view of the mutual obligations and promises of the parties.

The services, as alleged by appellant, being safely within the lawful rule in his favor, it makes no difference whether or not they are a part of the consideration of the agreement, inasmuch as they do not tend to make the agreement one against public policy.

As a matter of fact, appellant has tendered his own and not Government money in order to meet the terms of the agreement, the Government money not as yet having been paid to any one (Rec. pp. 3, 4).

The allegations of the bill (Rec. p. 3, par. 5) to the effect that there had been no change in the value of the property except that occasioned by the location of the Hall of Records, a fact evidently contemplated by the parties at the time they entered into the agreement, or that the appellee denies the right of appellant to the purchase money in excess of $9,000, do not make, or tend to make, the agreement one for a contingent fee. The appellant had agreed to buy the property for $9,000, and of course he intended to sell it for more, if he could get it. This differs from an agreement for a contingent fee by the terms of which a party or attorney does not buy the claim or property and pays nothing for it, but is to have a per cent of whatever sum may be recovered. This class of contingent agreements is held valid in claims against the Government (Taylor vs. Bemiss, 110 U. S., 42; Stanton vs. Embrey, 93 U. S., 546; Nutt vs. Knut—U. S., present term.

The fact is that when the court applies the proper rule of construction to the agreement (Drexel vs. Berney, 122 U. S. 254), either upon its face, or by "looking through the form to the substance," it will result in finding the transaction and the agreement one for the purchase by the appellant of real estate for a valuable and adequate price and which, as shown by the allegations of the bill, he, in turn, relying on the said agreement as to his rights, sold to the Government for a fixed price. Appellant was, by virtue of his agreement with appellee, the owner of the property, exercised that right over it in making the sale to the Government, and equity in "looking through the form of the transaction" should award him his just rights and should not allow to be read into the agreement a contingent fee, ambig-

uity, corrupt tendency, or something that is not there, either directly or by implication, which will permit the appellee to have declared void an agreement honestly entered into by him and the obligations and promises of which were never withdrawn, and to which he consented up to the last minute of the transaction with appellant, and concerning which the public has no interest; and in respect to which agreement the appellee never gave any reasons or claimed any excuse whatever to the appellant for his conduct in attempting to repudiate the same, up to the time of the filing of the general demurrer in this suit, but simply intimated that he did not intend to keep such agreement (Rec. 3, par. 5).

The allegations of the bill, which are admitted by the demurrer, show that neither the committees of Congress nor Congress itself, was misled or misguided by anything the appellant did in the transaction with them, nor was there any attempt on the part of appellant to mislead them. His labors, performed partially at their request, undoubtedly served to furnish reliable and valuable information to the committees and to Congress in fixing the location and purchase of the most suitable and convenient site in the city for a Hall of Records, and aided in the passage of statutes upon the subject which are well guarded in their provisions, and the very provisions of which repel the suggestion of fraud or misguidance in their enactment (32 Stat., pp. 1039, 1212, sec. 16). The statutes, as the result of the transaction, are beneficial to the interest of the United States and not injurious to it. From all that appears in the record there was no design on the part of appellant to prejudice the public interest, and such design must clearly appear to warrant a court in denouncing a contract void:

> Richardson vs. Mellish, 2 Bing. 229, 243.
> Nichols vs. Cabe, 3 Head (Tenn.), 92, 96.
> Hertz vs. Wilder, 10 La. Ann. 199.
> Greenhood on Pub. Pol., Rule 129, p. 116.

The court said, in Richardson vs. Dubuque and Sioux City R. Co., 26 Iowa, 191, 202, as follows:

> "The power of the courts to declare a contract void for being in contravention of sound public policy is a very delicate and undefined power, and like the power to declare a statute unconstitutional should be exercised only in cases free from doubt" (Greenh. Pub. Pol. p. 116).

In Kellogg vs. Larkin, 2 Pinney (Wis.), 123, s. c., 56 Am. Dec. 164, and 3 Chandler, 123, it is said:

> "Before a court should determine a transaction, which has been entered into in good faith, stipulating for nothing that is *malum in se* to be void as contravening the policy of the State, it should be satisfied that the advantage to accrue to the public for so holding is certain and substantial, not theoretical or problematical. He is the safest magistrate who is more watchful over the rights of the individual than over the convenience of the public, as that is the best government which guards more vigilantly the freedom of the subject than the rights of the State."

Caldwell, J., said, in Swann vs. Swann, 21 Fed. Rep. 299:

> * * * "To hold a contract void on the ground of its impolicy or inconvenience, we ought to be clearly satisfied that the performance of it would be necessarily attended with injury or inconvenience to the public (Walsh vs. Fussell, 3 M & P. 457; s. c., 6 Bing. 163).
>
> "An agreement is not void on this ground, unless it expressly and unquestionably contravenes public policy, and be manifestly injurious to the interest of the State (Chitty on Contracts, 664). If a contract will bear two constructions, that which upholds its validity will be preferred to that which would void it by reason of its repugnancy to public policy (Greenhood on Pub. Pol., p. 123, Rule 139, and note 1, cit-

ing Church Wardens, 10 Rep., 67, *b;* Archibald vs. Thomas, 3 Cow. 284; Coke Lit., 42, 183; Atty. Gen. vs. Chapman, 31 Eng. L. and Eq. 142; Many vs. Beekman Iron Co., 9 Paige, 188; Shore vs. Williams, 9 Cl. and Finn. 397)."

The objection that a contract is void by reason of public policy is not entertained out of regard for the party making it, but to promote the public interest (Greenh, Pub. Pol. 126; Kelton vs. Milliken, 2 Cold., Tenn., 410, 415; Stillman vs. Looney, 3 ib. 20, 22; Kimbrough vs. Lane, 11 Bush [Ky.], 556, 564; Summerlin vs. Livingston, 15 L. & Am. 519).

It must be found that the agreement here, or the allegations of the bill, make out such a case as will avoid the transaction for the sake of public policy; or to avoid injury to the public, without reference to the conduct of individuals (Shrewsbury & Birmingham R. Co. vs. London, &c., R. Co., 4 Dec. G. M. & G. 115, 135; Simpson vs. Lord Howden, 1 R. Cases, 326, App. 335).

The law relating to "lobbying contracts," or contracts to control legislation, is set out fully in 9 Am. & Eng. Ency. of Law, 1st ed., page 898, *et seq.*, with references to the leading cases.

When, however, the subject is sifted out the rules will be found to relate to offensive lobbying contracts where personal influence on legislators is either expressly provided for or the tendency is beyond question. The allegations of the bill of appellant present the test upon the question here, and a fair consideration of them can not fail to convince any judicial mind that there is nothing in the transaction with appellant or in his conduct that will bring him within the rule of "evil tendency." In one reported case (Workman vs. Campbell, 46 Mo. 305), where the party prevailed upon a board of railroad directors to locate a depot on certain land, the promised contingent fee was recovered. And in that case the fee was expressly contingent.

In Sedgwick vs. Stanton, 14 N. Y. Rep. 289, a party undertook, at his own expense, to obtain title for another from the State to a certain lot of ground, the consideration for such services to be one undivided half of the lot, free from incumbrance or lien, except for the purchase money. It was insisted that the contract was void on the ground that it was against public policy, and Hubbard, J., after citing the cases to which the doctrine of public policy is applicable, says:

> "The aid of the law is not withdrawn from any consideration of the rights or equities of the parties, as between themselves, but solely to prevent an infringement of the public law or policy of the State."

The court makes clear the distinction between contracts where lobby services are to be performed with individual members of a legislative body, or similar body, or before such a body or its authorized committee. The court said:

> "The purpose of the contract was to induce the commissioners of the land office to act upon the question, and to determine whether the State needed the lot to be reserved for the use of the canal or salt springs. * * * It was the defendant's right to urge and procure this determination and to this end he could call in the serivces of an agent to act in his behalf, and to stipulate for a reasonable compensation. *In such an agency the public would have no interest.*" It may be remarked that Selden, J., delivered a forcible concurrent opinion in this case (p. 293).

The following cases cited by defendant in the court below do not have any bearing upon the contract and questions now before the court:

Clippinger vs. Hepbaugh, 5 W. & S. (Pa.), 315, cited by counsel for appellee, was a suit on an agreement to pay a contingent fee to a lawyer if he succeeded in procuring legislation authorizing his client and wife to sell certain

real estate. The agreement expressed the fee as a contingent one, and differed, therefrom, from appellant's agreement. His contract was for services in procuring a legislative act, and nothing else, and yet the court did not deny that certain compensation might be recovered for such services. And in that case the court passed upon an agreement for a contingent fee, and nothing else, and the ruling of the court is substantially the same as in Tool Company vs. Norris, *supra*, which we have already undertaken to show does not apply here, either as to the transaction or the agreement.

In Wood vs. McCann, 6 Dana (Ky.), 366, in an action for debt on a promise to the lawyer for obtaining the passage of two bills, one divorcing the promisor from a former wife from whom he had not been legally divorced, and the other legalizing the marriage with his then alleged wife, the court makes observations concerning contracts for contingent fees, although the agreement does not appear to have been for a contingent fee, but in the end gave a judgment for the plaintiff.

We have gone over the foregoing cases for the purpose of distinguishing the contracts, transactions, and surroundings in those cases from the agreement, transaction, and surroundings of the parties to this suit. In all of those agreements, excepting probably one (6 Dana), the contingent fee was expressly provided for, and the services to be performed were such as to require work, in order to execute the contract in a legislature or department where the evidence, direct or circumstantial, showed that personal influence (lobby services) was the consideration of the contracts.

Such is not the case in regard to the agreement and transaction between the parties to this suit. When equity looks to it, or through it, to the substance, it sees that no expressed contingent fee is to be earned by services in Congress to carry it out, but it sees an honest agreement and transaction for the sale of real estate from the appellee to

the appellant within a certain limitation of time upon mutual stipulations or the agreement is to be void; it sees as a part of the agreement, as well as the substance thereof, that the appellee is to execute to the appellant a good and sufficient deed to the property, and that the appellant is to pay therefor the sum of $9,000.

There is nothing in the allegations of the bill that even points toward "'log rolling" by the appellant. He was interested in procuring the adoption of square 143 for a Hall of Records, because his own property and the property on which he held the agreement and option to purchase were situated there. There was no room for lobbying in connection with the transaction. The bill sets forth the means used by the appellant and they most assuredly show that he was not guilty of "log rolling" for a contingent compensation either expressed or implied, or for any other purpose.

In this case the Executive Department repeatedly called upon Congress to provide a Hall of Records as a measure of necessity to preserve the public records. Congress attempted to carry out the demands of the department and the committees undertook the necessary investigations. These investigations involved services and expenses which could not be and never are undertaken by Congress or its committees, and are always rendered by the parties interested.

No question of policy was involved. The services contemplated related to the selection of the best site and to such matters as were required to be considered by Congress or its committees in determining this question, viz, suitable and convenient location, comparative cost, title, character of soil, drainage, accessibility, value of improvements, readiness, and preparation to respond to the requirements of the committees. These were all strictly legitimate and necessary services, and such as are usually rendered in like transactions at every session.

THE AGREEMENT IS VALID EVEN IF CONSTRUED TO BE FOR A CONTINGENT COMPENSATION.

But, even if this contract can be construed to be one for the performance of service before a legislative body or its committees for a contingent compensation, we contend that it is not against public policy and that it is valid and binding upon the appellee.

In Lyons vs. Mitchell, 36 N. Y. 235, it is said that it is allowable to employ counsel to appear before the legislature itself, to advocate or oppose a measure in which the individual has an interest, for an honest purpose, avowed to the body before which the appearance is made, and by the use of just argument and sound reasoning.

In Trist vs. Child, 21 Wall. 441, 450, the court says:

> "We entertain no doubt that * * * an agreement, express or implied, for purely professional services is valid. Within this category are included drafting the petition to set forth the claim, attending to the taking of testimony, collecting facts, preparing arguments, and submitting them orally or in writing to a committee or other proper authority, and other services of like character." Cited and approved in Wright vs. Tebbitts, 91 U. S. 254; in Stanton vs. Embrey, 93 U. S. 548; in Farrington vs. Tennessee, 95, U. S. 679, 682.

In Howland vs. Coffin, 47 Barb. (N. Y.) 653, it is said that where an agent is employed to negotiate with the Government, it has been held that it would be presumed that it was the contemplation of the parties that he should use only proper methods in transacting the business.

Interested claimants, whose interests are to be affected by legislation, may, both morally and legally, for the protection and advancement of their own interests, use all means of persuasion which do not come too near bribery or corruption; but the promise of any personal advantage to a

legislator would be void (2 Par. Cont, 6 ed. 919; Marshall vs. B. & O. Railroad Co., 16 How. 314; Harris vs. Roof, 10 Barb. [N. Y.], 489; Coppeck vs. Bower, 4 M. & W. 361; Fuller vs. Dame, 18 Pick. [Mass.], 472; Hatzfield vs. Gulden, 7 Watts [Pa.], 152; Gulick vs. Ward, 5 Halst [N. J.], 87).

It is not necessary to refer to additional authorities to sustain the claim that the plaintiff's agreement, and his acts, as alleged, are well within the rules of law laid down by the above authorities, and therefore valid.

The Supreme Court has uniformly held contracts with attorneys for contingent fees to prosecute claims against the Government, either in courts, before the Departments, or before Congress, valid where the contracts provided for and the services rendered were only legitimate professional services, and that court has consistently drawn the distinction between that class of contracts and contracts that contemplate the use and exercise of personal influence or lobby services, or where such influences or services have been rendered. This distinction will appear by consulting the following cases:

Wylie vs. Cox, 15 How. 416.
Marshall vs. B. & O. R. R. Co., 16 How. 335.
Tool Co. vs. Norris, 2 Wall. 45.
Trist vs. Child, 21 Wall. 441.
Wright vs. Tibbets, 91 U. S. 252.
Stanton vs. Embrey, 93 U. S. 548.
Oscanyan vs. Arms Co., 103 U. S. 261.
Taylor vs. Bemiss, 110 U. S. 42.
Ball vs. Halsell, 161 U. S. 80.
Spalding vs. Mason, 161 U. S. 375.
Nutt vs. Knut—U. S. present term.

In four of the above mentioned causes, to wit, Marshall vs. Railroad Company, Tool Company vs. Norris, Trist vs. Child, and Oscanyan vs. Arms Company, the contracts

were held invalid. The facts in the case of Marshall *vs.* Railroad Company have already hereinbefore been stated showing it to have been of the most corrupt nature. In Tool Company vs. Norris the court expressly found that Norris agreed to use his personal influence to obtain the contract for the Tool Company from the Secretary of War. In the case of Oscanyan vs. Arms Company the court expressly finds and states in the opinion that the consideration of the contract was the use of personal influence by the plaintiff to procure a contract for the defendant. In each of the other cases above cited nothing appeared in the evidence to indicate that the nature of the services to be rendered by the attorney or agent was other than legitimate services, and that only services of that character were rendered. In the case of Ball vs. Halsell, 161 U. S. 80, the court refers to the prior cases holding such contracts valid.

Although there is nothing stated upon that point in the opinion of the court in the case of Spalding vs. Mason in 161 U. S. 375, yet it has an important and conclusive bearing upon the question at issue. In the case of Oscanyan vs. Arms Company, 103 U. S. 261, the plea did not allege the illegality of the contract, but the trial court, upon the opening statement of the plaintiff's attorney as to the nature of the contract, showing that it was for personal influence, directed a verdict for the defendant, and it was contended in the Supreme Court that that was error for the reason that the pleadings did not raise that question, but the Supreme Court expressly held that where the evidence showed that a contract was invalid as being against public policy it was the duty of the court, although the question might not be raised by the pleadings or by counsel, to dismiss the cause.

In the case of Spalding vs. Mason it appeared in the evidence that Spalding was prosecuting a large number of

claims against the Government for postmasters, to be successful in which required the obtaining of legislation by Congress; that he needed money to use in paying expenses of carrying on the prosecution of said claims, including the procurement of the necessary legislation; and that he assigned an interest in his fees to Mason in consideration of $2,500, which Mason advanced him to enable him to carry on that business, and that Mason was to receive nothing unless Spalding was successful and then he was to receive a portion of Spalding's fees. These facts all appear in the statement of the case in 161 U. S. 375 to 388, inclusive. While nothing is said in the opinion upon the point it is apparent that the court acting pursuant to the opinion announced by it in the Oscanyan case, considered the question of the validity of the contract. The second paragraph of the syllabus says:

> "After a critical examination of the record the court, on the facts, finds that the contract which proves the subject of controversy in this suit is a valid contract and directs judgment for the defendant in error for the principal sum, which it finds to be due him, but orders a correction to be made in the calculation of interest by the court below."

If the court would ever be justified in drawing the inference, without direct evidence upon the point, that improper influences were in contemplation of the parties from the facts proved, it would have been justified in that case. For it was clear that money was to be used in procuring legislation, but it did not appear that it was to be improperly used, and the court followed the rule as announced by Mr. Justice Brewer when he was a member of the Supreme Court of Kansas in the case of Kansas Pacific Railway Company vs. McCoy, 8 Kan. 359. In that case it appeared that a part of the consideration of the contract sued on was that McCoy should use money to procure legislation by the legislature of

Illinios, bearing upon the subject of the shipping of live stock in which the railroad company was interested, and an instruction was asked on behalf of the defendant to the effect that if the jury believed from the evidence that the contract contemplated the use of money in influencing legislation that the contract was void, but the court modified the instruction as follows:

> "The influences used to control or direct legislation must be of an illegal, fraudulent, or corrupt nature such as bribery, using personal influence over members of the legislature, making false statements, and such other undue means; but presenting a petition to the legislature calling attention to or praying for legislation on some lawful or proper measure and publicly giving true information, either orally or by printed matter, and other proper and lawful acts, could not be using improper, unlawful or undue means."

In approving that instruction Mr. Justice Brewer uses the following language:

> "Was the plaintiff in error entitled to the first (instruction) as presented, or was the modification necessary to present the law fully and correctly to the jury? We think that the modification was necessary. The use of money to influence legislation is not always wrong. It depends altogether on the manner of its use. If it be used to pay for the publication of circulars or pamplets, or otherwise for the collection or distribution of information openly and publicly among the members of the legislature there is nothing objectionable or wrong. But if it be used directly in bribing or indirectly in working up a personal influence upon individual members, conciliating them by suppers, presents or any of that machinery so well known to lobbyists which aims to secure a member's vote without reference to his judgment, this is not only illegal, but one of the grossest infractions of social duty of which an individual can, under the circum-

stances of the present day be guilty. * * * The instruction as presented declared all use of money illegal and contracts to use it void. This is not correct. It needed the modification given which presented to the jury the circumstances under which the use of money is illegal and a contract to use it void."

The same distinction is made in the case of Trist vs. Child, 21 Wall. 450, where the court says:

> "We entertain no doubt that in such cases, as under all other circumstances, an agreement expressed or implied for purely professional services is valid. Within this category are included, drafting the petition to set forth the claim, attending to the taking of testimony, collecting facts, preparing arguments, and submitting them orally or in writing, to a committee or other proper authority, and other services of like character. All these things are intended to reach only the reason of those sought to be influenced. They rest on the same principle of ethics as professional services rendered in a court of justice, and are no more exceptionable. But such services are separated by a broad line of demarcation from personal solicitation, and the other means and appliances which the correspondence shows were resorted to in this case."

The counsel for defense in his argument in the court below attempted to draw a distinction between a contract for a contingent fee for procuring legislation that was not in furtherance of the payment of a claim and a case where there was a claim. It is submitted that the cases make no such distinction. No court in its opinion in any of the cases, so far as counsel for the plaintiff has observed, refers to any such distinction. The case of R. R. Co. vs. McCoy, *supra*, is a case of the former character where the contract was held to be valid although for

a contingent fee for procuring legislation beneficial to the railroad company, which was not in the nature of a claim which it had against the State.

In the subsequent case of M'Bratney vs. Chandler, 22 Kan., 482, the contract sued upon was one for a contingent fee for prosecuting a claim against the Government and the court below directed a verdict for the defendant. The case was reversed on the ground that while there was some evidence tending to show that the services contracted for and rendered were in the nature of personal influence or lobby services yet there were some evidence tending in the opposite direction, and that it was a question for the jury.

Mr. Justice Brewer, in his opinion in that case, says:

> "We quote from counsel's brief: 'Now, the propositions proven by all the testimony are these: (1) Sims employed M'Bratney; (2) Sims employed plaintiff to influence legislation and to use his personal influence with Senators, Members of Congress, and the heads of Executive Departments; (3) the pay of plaintiff was contingent upon success.' Doubtless it was upon this theory that the demurrer (to the evidence) was sustained; and while there is abundant testimony to justify such a conclusion, yet we are constrained to think that it does not all tend in that direction. And because it does not the court was not warranted in withdrawing the case from the jury. * * * The exact terms of the contract, and the exact nature of the services performed are in doubt. If all that was contemplated was the preparing of briefs, the making of oral arguments before the department or a committee of either house, the contract was valid and the services legitimate. If the employment of plaintiff was as a lobbyist and to render the services usually rendered by such parties, the contract was against public policy and void. We had occasion

to notice this question and draw the line of distinction between the two classes of services in the case of Kansas Pacific Railroad Company vs. McCoy, 8 Kans., 543, and it is unnecessary to more than refer to that case."

The justice then refers to the case of Marshall vs. B. & O., Tool Company vs. Norris, Trist vs. Child, and adds:

"This, briefly, may be stated to be the law: The contract of an attorney for services as such, whether the services are to be rendered before a court, a department of the Government, or a legislative body, is valid, and upon performance of the services a recovery can be had. The contract of a lobbyist, in the sense in which that term is now used, for his services as such, is against public policy and void. Where there is a single contract, and the services contracted for and rendered are partially those of an attorney and partially those of a lobbyist, and blended together as part and parcel of a single contract, the entire contract is vitiated. 'That which is bad destroys that which is good, and they perish together.' There is no presumption that a contract is illegal. He who denies his liability under a contract, which he admits having made, must make the fact of its illegality apparent. The burden of showing a wrong is on him who seeks to deny his obligation thereon. The presumption is in favor of innocence, and the taint of wrong is a matter of defense. (See also, Swann vs. Swann, 21 Fed. Rep., 299.)

"Because the testimony is not all one way, the question should have been submitted to a jury, and there was error in sustaining the demurrer."

The last quotation applies with great force to the present case. There is nothing upon the face of the contract to indicate its illegality. There is no allegation in the bill to indicate it. If the plantiff performed only the ser-

vices and acts alleged in his bill they were all legitimate and proper. If the defendant claims that the contract contemplated any improper services or conduct on the part of the plaintiff the burden is upon him to allege and prove it. By demurring to the bill he has admitted the facts as stated therein and it does not now lie in his mouth to question them.

Upon the foregoing presentation of the case we contend that the appellant is entitled to the specific performance of his agreement. The authorities hold that the remedy is not to be exercised arbitrarily or capriciously, but that its administration is governed by settled principles; that the use of the term "discretion" is misleading and inaccurate, for in a proper case—that is, where all the necessary elements, conditions, and incidents are present—relief by way of specific performance should be granted as a matter of course and not merely as a matter of favor within the arbitrary discretion of the court.

Mutuality of the Agreement.

The agreement is not objectionable on the ground of want of mutuality. No such objection could well exist in view of the authorities upon the subject, but if it had, it was cured by the election of the appellant to purchase under the contract within the time specified therein, and having notified the appellee of such election and tendered him the purchase money, a contract of sale between the parties was thereby perfected, and a court of equity will decree the specific execution thereof.

Young vs. Paul, 10 N. J. Eq., 401, 406.
Richards vs. Green, 26 Conn., 536.
McFarson's Appeal, 11 Pa. St., 503.
Smith and Fleek's Appeal, 69 Pa. St., 474.
Grove vs. Hodges, 55 Pa. St., 504, 516-7.

Fry on Sper. Perf., Secs. 297, 298, 299.
Waterman on Spec. Perf., pp. 267-8, Note 1.
Willard vs. Tayloe, 8 Wall., 557.
Brown vs. Slee, 103 Wis., 828.
Watts vs. Kellar, 56 Fed. Rep., 1.
22d Am. and Eng. Encyc. L. (1st ed.), pp. 910-913, p. 925, par. 3.
Brewer vs. Herbert, 30 Md., 301.
Sedgwick vs. Stanton, 14 N. Y., 289.

In Young vs. Paul, 10 N. J. Eq., 401, 406, where it was claimed that the agent who signed the contract for the complainant was not legally authorized to do so, and that the defendant only was bound by it, and that as the defendant could not, for that reason, compel a specific performance by the complainant, the parties were not mutually bound. The court, after reviewing conflicting authorities on the subject, says:

> "The contract is undoubtedly binding on the defendant at law, and if the court refuses to compel a specific performance it is simply on the ground that the want of mutuality renders it more equitable that the party should be left to his remedy at law.
>
> "It is no legal unyielding obstacle to the courts making a decree that the contract is signed only by one of the parties. In that sound legal discretion by which a court of equity exercises this branch of its jurisdiction, it frequently does refuse to decree a specific performance of a contract which is not mutually binding on both parties; not, however, because it is a settled principle that the court will not enforce such a contract, but because that want of mutuality often constitutes an equitable ground for such refusal, as if the party not signing the agreement, and therefore not legally bound, takes advantage of his position and delays the fulfilment till it is ascertained whether the bargain is advantageous to him."

In Richards vs. Green, 26 Conn., 536, the unilateral agreement to sell a lot of land for $2,500 was, upon a tender of $500 and a mortgage for the residue in accordance with the terms of the agreement, which was refused by the vendor, enforced by the court by a decree for specific performance.

McFarson's Appeal, 11 Pa. St., 503, holds that any memorandum in writing indicative of the intent of the parties, and so precise as to enable the inquirer to ascertain the terms of the contract, land to be conveyed, and the price to be paid for it, is a sufficient contract in writing to be enforced specifically. The statute of frauds is satisfied by a note in writing, not under seal, signed only by the party called on to fulfill it, if the other party has accepted it.

In Smith and Fleek's Appeal, 69 P. St., 474, the contract for the sale of real estate contained an option for its refusal ten days from date; the court held that it is sufficient if the contract be signed by the vendor, and that it is not necessary that the acceptance of it or election to take the land should be in writing, inasmuch as the contract does not require it; that the option feature of the contract did not render it devoid of mutuality, so as to prevent a decree of specific performance on this ground.

In Grove vs. Hodges, 55 Pa. St., 504, 516-7, the court says, want of mutuality is no defense to either party, except in cases of executory contracts, as to one party the obligation was fulfilled, the contract having been executed when it was made. As to the other party it remains executory. A consideration may be something done, or to be done, or a promise itself.

The agreement and offer to sell on the part of the appellee has never been withdrawn or cancelled by him. The acceptance of the agreement, and tender of the pur-

chase money by the appellant within the time specified in the agreement, and prior to any withdrawal of said agreement, offer, and option, fixed its mutuality between the parties beyond question.

Fry on Spec. Perf., Secs. *297* ,*298*, *299*.
Waterman on Spec. Perf., pp. *267-8*, Note 1.

The above rule appears to be well established by the text books and decisions of the courts (*22* Am. and Eng. Encyc. L. (1st ed.), pp. 910-913, and cases cited).

In *Raymond vs. San Gabriel, &c., Co.*, 53 Fed. Rep., 885, the Circuit Court of Appeals says:

> "A vendor of real estate, who has executed a title bond conditioned for the conveyance of the land upon the payment of the price, has an election of remedies to recover the purchase money. He may sue therefor at law, or he may resort to equity for a specific performance of the contract by the vendee. Whenever the purchaser has the right to go into equity and compel the execution and delivery of a deed, the principle of mutuality gives the vendor the right to go into equity to compel the vendee to perform the contract on his part by paying the purchase money. This is an exception to the general rule that equity will decline jurisdiction of a suit for a money demand which could be recovered by an action at law. The exception is based on the established doctrine of equity that the right to a specific performance must be mutual, and that it must be enjoyed alike by both parties to every contract to which the jurisdiction extends. In every case, therefore, where the vendee would have the right, by a suit in equity, to compel the execution and delivery of the deed by the vendor, the latter may, by a similar suit, enforce the obligation of the vendee to pay the purchase money." Pom. Cont., Sec. 6, 165; Cathcart vs. Robinson, 5 Pet., 264, *278*; Railroad Corp. vs. Evans, 6 Gray, *25*; Hopper vs. Hopper, 16 N. J. Eq., *147*; Springs vs. Sanders, 1 Phil. Eq., *67*; Crary vs. Smith, *2* N. Y., 60; Fry, Spec. Perf., Sec. *23*; Greenfield vs. Carlton, 30 Ark., 547.

If we have succeeded in showing that the agreement between appellant and appellee is valid, and free from the objection that it and the transaction surrounding it, as shown by the allegations of the bill, do not infringe or tend to infringe public policy, the enforcement of the specific performance of the agreement should be granted as a matter of course. The rights of the parties under such an agreement are well fixed by the decisions. The appellant was entitled to have his agreement, which was duly accepted by him, complied with by the delivery to him of a good and sufficient deed to the land, when he tendered the $9,000 and demanded the deed (Rec., p. 4). Under the rule that "equity regards that done which ought to have been done," the authorities are uniform to the effect that—

> "an executory contract of sale is regarded in equity under this doctrine as already executed, and equitably the vendee becomes the owner and the vendor is seized in trust for him, holding merely a lien on the land for the purchase money, while the purchaser becomes trustee for the purchase money, and is chargeable with interest thereon. The doctrine finds its most frequent application to agreements for the sale of real estate. In such agreements, equity declares that from the hour the contract is made the vendee becomes the owner of the land and the vendor holds it in trust for him" (22 Am. & Eng. Encyc. L., 1st ed., p. 925, par. 3, and numerous cases under note 1).

In Brewer vs. Herbert, 30 Md., 301, the court, upon a review of the cases, says:

> "From these, and other authorities of equal weight, announcing the maxim that equity regards as done that which was agreed to be done, is deduced the established doctrine in equity, that from

> the time the owner of an estate enters into a binding agreement for its sale, he holds the same in trust for the purchaser, and the latter becomes a trustee of the purchase money for the vendor, and being thus in equity the owner, the vendee must bear any loss which may happen and is entitled to any benefit which may accrue to the estate in the interim between the agreement and the conveyance."

In Sedgwick vs. Stanton, 14 New York Rep., 289, an action was commenced to compel the specific performance of a contract, the services to be rendered, and which were rendered thereunder, being similar to those rendered, as alleged in the bill, by the appellant in this case. There was a difference in the contracts in this respect, namely, that appellant's contract is for the sale and purchase by way of option, upon mutual promises and stipulations, of the lot described therein, while the contract in the Sedgwick case provided expressly for a compensation of an undivided one-half of the land described. It was contended that the contract was void as against public policy, but the court said that—

> "no principle of the public law of the State was infringed by the terms of the contract or the manner of its performance" (p. 291).
>
> "The adjudications in this class of cases (public policy) proceed on the ground of some public injury which the performance of the stipulations of the parties would likely produce. The aid of the law is not withdrawn from any consideration of the rights or equities of the parties, as between themselves, but solely to prevent an infringement of the public law or policy of the State" (p. 292).

The court says "no public interest was violated in the execution of the contract," and holds that the services

performed were proper, and the compensation stipulated for (one-half the property) was reasonable, and as the object and manner of the performance of the contract were entirely legal, a judgment was entered requiring specific performance of a conveyance of the property according to the terms of such contract.

When a contract is a fair one, and the circumstances attending its execution appear to be free from objection, it is the usual practice of courts of equity to enforce its specific execution upon the application of the party who has complied with its promises and stipulations on his part, or has seasonably and in good faith offered, and continues ready to comply with them (Willard vs. Taylor, 8 Wall., 565). And it seems that the discretion of the court is only asserted concerning contracts where there exists some inequality or unfairness in their terms by reason of which injustice would follow the specific performance, or where its enforcement, from subsequent events or from collateral circumstances, would work hardship or injustice to either of the parties (Ib. 566).

> "A contract for the sale of real estate at the option of the vendee only, upon election and notice, may not only be specifically enforced, but the refusal of the vendor to accept the purchase money will not destroy the mutuality, though the vendee could thereupon withdraw his election" (Waterman on Spec. Perf. and Contracts, pp. 267-8, and note 1).
>
> "Where a contract consists of several distinct and separate stipulations on one side, and a legal consideration is stated on the other, it must be considered that the entire contract was in the contemplation of the parties in each particular stipulation, and formed one of the inducements therefor, and no one stipulation can be supposed to result from, or compensate the consideration, or any part of it, exclusive of other stipulations, unless the parties have

expressly so declared; and this will be the case, whether the consideration be a sum of money to be paid in gross, or a specific act to be performed or several payments in money, or several acts to be performed" (Stansburg vs. Fringer, 11 Gill. and Johns, 149).

"It has been held that an option on real estate, if accepted and acted upon before it has been withdrawn, may be enforced as a valid contract, to convey, even though given without consideration" (22 Am. and Eng. Encyc. L., 1st ed., p. 971, and note 2).

In Boston & Maine Railroad vs. Bartlett, 3 Cush. (Mass.), 224, there was a contract to convey land which was duly accepted. There was no consideration for the contract other than the purchase price of the property. The point was made by the demurrer that the agreement was without consideraion and therefore not obligatory. The court holds that inasmuch as the offer to sell and convey was not withdrawn, and the offer having been accepted, the minds of the parties met and the contract was complete The acceptance constituted a sufficient legal consideration and the bargain was completed. As the bill set up a proposal in writing, and an acceptance and offer to perform, within the time limited, and while the offer was in full force, all of which was admitted by the demurrer, a valid contract in writing was shown to exist and the demurrer was overruled.

The case of Willard vs. Tayloe was an option on the part of Willard to purchase what is now known as the Willard Hotel property. That option was contained in a lease for ten years dated April, 1854. Willard did not avail himself of the option until in April, 1864, a few days before it expired. One of the objections to specific performance was the alleged want of mutuality because Willard was not bound to purchase. In answering this objection the Supreme Court said:

"The covenant in the lease giving the right or option to purchase the premises was in the nature of a continuing offer to sell. It was a proposition extending through the period of ten years, and being under seal must be regarded as made upon a sufficient consideration, and, therefore, one from which the defendant was not at liberty to recede. When accepted by the complainant by his notice to the defendant, a contract of sale between the parties was completed. This contract is plain and certain in its terms, and in its nature and in the circumstances attending its execution appears to be free from objection. The price stipulated for the property was a fair one. At the time its market value was under fifteen thousand dollars, and a greater increase than one-half in value during the period of ten years could not then have been reasonably anticipated."

In Brown vs. Slee, 103 Wis., 828, the option was for five years and was to be exercised by the vendor and he notified the vendee to take and pay for the property a short time before the option expired, which he declined to do, when the vendor filed a bill in equity praying for a sale of the property to pay the purchase money and a decree over against the vendee for any balance. This was a suit for specific performance and the relief prayed was granted by the court below and affirmed by the Supreme Court.

The case of Watts vs. Kellar in the 56 Fed. Rep. (a decision of the Circuit Court of Appeals for the Eighth Circuit), was similar to the one last mentioned and specific performance was decreed, the court using the following language:

"An option to sell land is as valid as an option to buy. When one holding a buyer's option makes his election to purchase, and tenders the money according to the terms of the contract, it is the duty of the

seller to accept the price, and execute a deed to the purchaser for the property; and when one holding an option to sell elects to make the sale, and tenders a deed, it is the duty of the buyer to accept the deed, and pay the price. Such contracts are perfectly valid, and it is now well settled that a court of equity may decree a specific performance of them."

For a collection of the authorities to the point that after the exercise of an option to purchase or sell real estate, such contracts are treated in all respects as other contracts in relation to real estate, including the remedy by specific performance, see 21 A. & E. Enc. of Law, 2d ed., 933 and 935, 26 id., 30, and notes.

The case of Marble Company vs. Ripley, 10 Wall., 339, cited by counsel for the defendant in the court below, is not in point. In that case the contract gave to the party who sued for specific execution the right to have marble taken out of a certain marble quarry to such extent as he might desire, but the contract also provided that he might put an end to it at any time by giving one year's notice, while the other party could not. Of course, there was a lack of mutuality in that contract and was a sufficient ground to deny specific execution, but there were other grounds mentioned by the court as well. One was that the party suing for specific execution had not stirctly complied with the contract himself, and the other was that if the person in possession did not quarry and furnish him the marble in accordance with the contract he had the right to enter and quarry it himself. But the main ground upon which the court denied specific execution was that the contract was one of continuous operation; that it required a person skilled in the quarrying of marble to execute the contract, a duty which the court could not undertake to perform.

The fact that a vendee of real estate in an executory contract may have a remedy at law for the recovery of damages is not of itself sufficient to justify a court of equity in denying specific performance. Specific performance of a contract for the sale of real estate is decreed in equity unless there are some facts or circumstances in the case that render it inequitable to do so.

The Supreme Court, in Willard vs. Tayloe, *supra*, after stating, on page 566 of the report, that the court had a discretion in such cases and would exercise it against specific performance where from unfairness or inequality in the contract or events subsequent to the contract or collateral circumstances it would be inequitable or a hardship upon either party, on page 567 said:

> "It is true the cases cited, in which the discretion of the court is asserted, arose upon contracts in which there existed some inequality or unfairness in the terms, by reason of which injustice would have followed a specific performance. But the same discretion is exercised where the contract is fair in its terms if its enforcement from subsequent events or even from collateral circumstances would work hardship or injustice to either of the parties."

And again, in pages 570 and 571, it is said:

> "We proceed to consider whether any other circumstances have arisen since the covenant in the lease was made, which renders the enforcement of the contract of sale, subsequently completed between the parties, inequitable. Such circumstances are asserted to have arisen in two particulars. First, in the greatly increased value of the property; and second, in the transfer of a moiety of the complainant's original interest to his brother.
>
> "It is true the property has greatly increased in value since April, 1854. Some increase was anticipated by the parties, for the covenant exacts, in case

of the lessee's election to purchase, the payment of one-half more than its then estimated value. If the actual increase has exceeded the estimate then made, that circumstance furnishes no ground for interference with the arrangement of the parties. The question in such cases always is, was the contract, at the time it was made, a reasonable and fair one? If such were the fact, the parties are considered as having taken upon themselves the risk of subsequent fluctuations in the value of the property, and such fluctuations are not allowed to prevent its specific enforcement. Here the contract, as already stated, was, when made, a fair one, and in all its attendant circumstances, free from objection."

In the present case no considerable time was to elapse between the contract and the time when the option was to be exercised, and there is no claim that there has been any change in the value of the property except that occasioned by the location of the Hall of Records, a fact that was in contemplation of the parties at the time they entered into the contract.

THE WIFE IS NOT A NECESSARY PARTY.

It is claimed that a decree can not be made against the wife, and certainly not without making her a party to the bill. This objection is not well taken in view of the bill and demurrer when considered in connection with the statutes and authorities. No question has arisen in the case as to the conduct of the wife. It does not appear from the pleadings that the wife has ever refused to sign a deed in accordance with the terms of her husband's agreement. As a matter of fact, the appellee has not even deigned to give an excuse for his conduct in attempting to repudiate his agreement. It was not the fear of imprisonment for contempt of court because his

wife refused to sign the deed that prompted his conduct. He admits that he "intimated to the plaintiff that he did not intend to keep his contract with him, but to convey the property direct to the United States and demand the right to receive from the United States the full sum of money which the Government has agreed to pay for the said land" * * * (Rec. 3). This is simply a bald attempt at repudiation, without giving any excuse for his act. There is nothing in the record in this case therefore that will justify the appellee in hiding behind the skirts of his wife for the purpose of evading a decree. This case does not fall within the line of cases in which decrees have been denied because the wife refused to sign the deed and where she was required to sign voluntarily and apart from her husband. In each of those cases the facts relied on appeared on the record, either in the pleadings or the evidence. No such facts appear upon the record here. The question as to whether the wife will refuse to sign the deed has not been reached in this case upon the bill and demurrer. The appellee may not have a wife.

Barbour vs. Hickey, 2 Appeals, D. C., 207, is a case in which the subject is reviewed, but it has no application here for the reason that the bill there alleged that the wife, who was a party to the bill, would not join the vendor in the deed. The record showed the facts. When this case was decided Sections 450 and 451 of the Revised Statutes of the District of Columbia controlled the acknowledgments of deeds, and the wife was required to declare, apart from her husband, that she executed and acknowledged the deed willingly and freely, and this was given as a reason for not decreeing specific performance in the case.

But no such reason can be asserted here. A wife is no longer required to make acknowledgments apart

from her husband, nor was she required to do so at the time the agreement in this case was signed and delivered to the appellant. This has been changed by Section 493 of the Code of the District of Columbia, and her acknowledgment is exactly like the one required of her husband. There is no reason therefore, as disclosed by the record, why specific performance should not be decreed against the appellee.

The wife was not a necessary party to the bill.

In the case of Young vs. Paul, 10 N. J. Equity, 401, which was a suit for the specific performance of an agreement concerning real estate, it was objected that the wife, who, as in the case at bar, had not signed the agreement, and was not a party to the bill; the court held that:

> "No decree could be made against her if she were a party. If she had actually signed the agreement with her husband, it would have been absolutely void as to her, and no suit at law or equity could be maintained against her upon such an agreement. A *feme covert*, can not make any contract, either with or without the consent of her husband, except as to her separate estate, in respect either to real or personal property. * * * Had she been made a defendant, a demurrer as to her would have been sustained.' (2 Kent's Comm., 13th ed., 168.)

And in the above case the defendant was ready and willing to perform his agreement and tendered a deed which the complainant refused to accept because it was not signed by the wife, the court declared, after reviewing the leading cases, that the complainant was entitled to a deed executed by the defendant *and his wife*, and that the deed executed and tendered, signed by the complainant alone, was not a compliance with the agreement.

It does not appear that the wife of the appellee could have bound herself under the provisions of the Code of Laws of the District of Columbia, by having placed her signature to the agreement with her husband. The Code provides, Section 1154, that married women over twenty-one years of age, shall have power to dispose of their separate property by deed, mortgage, lease, will, gift, or otherwise, as fully as if they were unmarried; but Section 1156 limits such contracts of married women to their separate estate.

It will be seen therefore that in this suit, as in the suit of Young vs. Paul, *supra*, the statutes "respecting the rights of married women do not affect this principle of the common law."

As to the point made in the court below therefore that the bill is defective because the wife is not a party, it is only necesary to say that no relief is or could be sought against her. She is not a party to the contract.

Fry on Sp. Per., Sec. 299.
Wood vs. Griffith, 1 Swanst., 55.
2 Sto. Eq. Jur., Sec. 779.
Clark et al. vs. Reins, 12 Gratt., 98.
Cady vs. Gale, 5 W. Va., 547, 565.

It is true that the deed prepared for the defendant to sign contains the surname of his supposed wife, but it was not necessary to make and tender any such deed (Willard vs. Tayloe, 8 Wall., 572-3).

It is submitted that according to the allegations of the bill the complainant is entitled to a specific execution of the contract, and that the decree of the court below should be reversed.

Respectfully submitted.

HEBER J. MAY,
Attorney for Appellant.